TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 146.

JOSEPH M. CUNNINGHAM, TRUSTEE; IDA MAY JONES, AND ANDRIEUS A. JONES, PLAINTIFFS IN ERROR,

vs.

CHARLES SPRINGER AND JOHN B. DAWSON.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

FILED NOVEMBER 9, 1905.

(19,960.)

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1 Be it remembered, That on, to wit, *on* the twenty-fifth day of October, A. D. 1905, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a writ of error to the Supreme Court of the United States, in a certain cause lately pending in the said Supreme Court of the Territory of New Mexico, in which Joseph M. Cunningham, Trustee, *et al*, were plaintiffs in error and Charles Springer *et al.* were defendants in Error, which said writ of error to the said Supreme Court of the United States, was and is in words and figures following to-wit:

2 THE UNITED STATES OF AMERICA:

The President of the United States to the Honorable Judges of the Supreme Court of the Territory of New Mexico, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment in a plea which is in the said Supreme Court, before you, wherein, Joseph M. Cunningham, Trustee, Ida May Jones and Andrieus A. Jones, were plaintiffs in error, and Charles Springer and John B. Dawson, were defendants in error, a manifest error hath happened, to the great damage of the said Joseph M. Cunningham, Trustee, Ida May Jones and Andrieus A. Jones, plaintiffs in error, as by *his* complaint appears.

We, being willing that error, if any hath been, should be fully corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, sixty days from the date hereof, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness The Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of the Supreme Court of the Territory of New Mexico this the 25th day of October, A. D. 1905.

[Seal Supreme Court, Territory of New Mexico.]

JOSÉ D. SENA,
Clerk Supreme Court of New Mexico.

3 TERRITORY OF NEW MEXICO, *Supreme Court, ss:*

I, the undersigned, clerk of the Superme Court of the Territory of New Mexico, do hereby make return to the within writ of error, by transmitting to the Supreme Court of the United States, a true copy of the record and proceedings, pleading and opinion in the cause

therein mentioned, under my hand and the seal of the Supreme Court of the Territory of New Mexico.

Witness my hand and the seal of the Spureme Court of the Territory of New Mexico, this the 25th day of October, A. D. 1905.

[Seal Supreme Court, Territory of New Mexico.]

JOSÉ D. SENA,
Clerk Supreme Court of New Mexico.

And Heretofore, on to wit, *on* the twenty-second day of December, A. D. 1903, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a transcript of record, which said transcript of record in the above entitled cause was and is in words and figures, following to-wit:

4 *Transcript of Record.*

Pleas before the Honorable William J. Mills, Chief Justice of the Supreme Court of the Territory of New Mexico, and Judge of the Fourth Judicial District Court thereof, at a regular term of said District Court, begun and held in and for the County of San Miguel, at the court house in the Town of Las Vegas, commencing on the eleventh day of November, A. D. 1901.

Complaint No. 2270-5464.

JOSEPH M. CUNNINGHAM, Trustee; IDA MAY JONES and ANDRIEUS A. JONES, Plaintiffs,
vs.
CHARLES SPRINGER and JOHN B. DAWSON, Defendants.

Be it Remembered, That heretofore, to wit: On the third day of August, A. D. 1901, the said plaintiffs filed in the clerk's office of the Fourth Judicial District for the Territory of New Mexico sitting in and for Colfax County, their complaint, which said complaint is in words and figures as follows, to wit:

Complaint.

TERRITORY OF NEW MEXICO, *County of Colfax:*

In the District Court, Fourth Judicial District.

JOSEPH M. CUNNINGHAM, Trustee; IDA MAY JONES and ANDRIEUS A. JONES, Plaintiffs,
5 *vs.*
CHARLES SPRINGER and JOHN B. DAWSON, Defendants.

Plaintiffs for cause of action state: That on or about the tenth day of October, 1891, the said defendants employed the plaintiff herein, Andrieus A. Jones, to render services for them, at their

special instance and request, as attorney at law, in and about the defense of certain litigations and suits at law brought and to be brought of and concerning a certain tract or parcel of land in the County of Colfax, Territory of New Mexico, one of which suits, to wit: A suit then pending in the District Court for the County of San Miguel, and Territory of New Mexico, numbered 4123 on the docket of said District Court, and entitled The Maxwell Land Grant Company *vs.* John B. Dawson and agreed to pay to said Andrieus A. Jones the reasonable value of said services.

That said services were reasonably worth the sum of seventy-five thousand ($75,000) dollars, which sum became due to the said plaintiff, Andrieus A. Jones, from the said defendants, on or about the seventh day of August, 1897.

That thereafter in a certain cause pending in the district court for San Miguel county, wherein the said plaintiff, Ida M. Jones, was plaintiff, and the said plaintiff, Andrieus A. Jones, was defendant, and numbered —— on the docket of said district court of San Miguel county, a decree was duly made and entered by the consent of the said plaintiff and defendant in said District Court of San Miguel County, New Mexico, whereby the said fee and compensation was vested in the plaintiff herein, Joseph M. Cunningham, as trustee, for the sole use and benefit of the plaintiffs herein, Ida M. Jones, and the said plaintiff, Andrieus A. Jones, an undivided one-half for the use and benefit of each.

That the plaintiff herein, Andrieus A. Jones, before the
6 entry of said decree, duly performed and rendered to the said defendants the services aforesaid, whereby said sum of seventy-five thousand ($75,000) dollars became due to him and by virtue of said decree is now due to the plaintiffs from the defendants, but defendants, though often requested so to do, have failed to pay to plaintiffs, or either of them said sum of money or any part thereof.

Wherefore, plaintiffs pray judgment for said sum of seventy-five thousand ($75,000) dollars and the costs of this suit.

Plaintiffs for a second and further cause of action state: That on to wit: The seventh day of August, A. D. 1897, the defendants were indebted to the plaintiff, Andrieus A. Jones, in the sum of seventy-five thousand ($75,000) dollars for the labor, services, care and diligence of the said Andrieus A. Jones, as an attorney and counsellor at law by him before that time done and bestowed in and about the business of the defendants, at their request; and being so indebted, the defendants, in consideration thereof, then and there promised the said plaintiff, Andrieus A. Jones, to pay him the said sum of money, on request.

That thereafter in a certain cause pending in the District Court for San Miguel County, New Mexico, wherein the plaintiff, Ida M. Jones, was plaintiff, and the said Andrieus A. Jones was defendant, and numbered —— on the docket of said court, a decree was duly made and entered by consent whereby the said indebtedness was vested in the said Joseph M. Cunningham, as trustee, for the sole use and benefit of the plaintiffs herein, Ida M. Jones, and Andrieus A. Jones, an undivided one-half for the use and benefit of each,

whereby the said sum of seventy-five thousand ($75,000) dollars became due from the defendants to the plaintiffs, but the defendants, though often requested so to do, have failed to pay to plaintiffs, or either of them, said sum of money or any part thereof, to the damage of the plaintiffs in the sum of seventy-five thousand ($75,000) dollars.

Wherefore, plaintiffs pray judgment against the defendants in the said sum of seventy-five thousand ($75,000) dollars, and the costs of this suit.

Plaintiffs for a third and further cause of action state that on to wit: The — day of ——, 1891, the said defendant, John B. Dawson, was the owner and claimant of a large tract of valuable land situated in the County of Colfax, and Territory of New Mexico, of very great value, to wit: The value of five hundred thousand ($500,000) dollars.

That thereafter, certain litigations and law suits of and concerning said land and the title thereof were commenced against said defendant, John B. Dawson, by the Maxwell Land Grant Company. That thereupon, on or about the --- day of ——, 1891, the said defendant, John B. Dawson, made and entered into an agreement to convey, and thereafter did convey to the said defendant, Charles Springer, a one-half interest of all the said valuable lands as aforesaid, in consideration that the said Charles Springer should pay all costs and expenses of carrying on and conducting to a final determination the defense of said claims to said valuable lands set up and made by said Maxwell Land Grant Company.

That in pursuance of the said agreement so made and entered into between the said Dawson and the said Springer for the carrying on and defense of said litigations, the said defendant, Charles Springer, on behalf of himself, and the said John B. Dawson, made and entered into a certain agreement with the plaintiff herein, Andrieus A. Jones, as an attorney and counsellor at law, whereby the said plaintiff, Andrieus A. Jones, agreed to conduct and manage for the defendants the defense of said litigations, and for such services
8 the said plaintiff, Andrieus A. Jones, was to receive a reasonable compensation, and that thereafter, in pursuance of said agreement, the said Andrieus A. Jones, did take charge of, manage, conduct and control the defense of said litigation to a successful issue, of which the said defendants had notice, and that the reasonable compensation therefor was and is the one-half of the value of the undivided one-half interest in said valuable lands, so set apart for the costs and expenses of conducting said defense. The net value of said one-half, plaintiffs allege, to be the sum of seventy-five thousand ($75,000) dollars.

That thereafter, in a certain cause pending in the District Court for San Miguel County wherein the said plaintiff, Ida M. Jones, was plaintiff, and the said plaintiff, Andrieus A. Jones, was defendant, and numbered — on the docket of said District Court of San Miguel County, a decree was duly made and entered by the consent of said plaintiff and defendant in said District Court of San Miguel County, New Mexico, whereby the said fee and compensation was vested in the plaintiff herein, Joseph M. Cunningham, as trustee,

for the sole use and benefit of the plaintiff herein, Ida M. Jones, and the said plaintiff, Andrieus A. Jones, an undivided one-half for the use and benefit of each.

Plaintiffs state that the said plaintiff herein, Andrieus A. Jones, has duly performed all the conditions of said contract on his part to be performed, but that the defendants and each of them, have and has wholly failed to perform their part of said agreement to the damage of the plaintiffs in the sum of seventy-five thousand ($75,000) dollars, for which plaintiffs pray judgment and the costs of this suit.

EUGENE A. FISKE,
Santa Fe, N. M.,
A. A. JONES,
East Las Vegas, N. M.,
Attorneys for Plaintiffs.

9 And afterwards to wit, on the third day of August, 1901, there was issued out of said clerk's office, a summons directed to the defendants, Charles Springer, and John B. Dawson, in said cause.

And afterwards said summons was returned duly served with the following endorsement thereon:

TERRITORY OF NEW MEXICO, *County of Colfax:*

I, Robert B. Campbell, Sheriff of Colfax County, do hereby certify that the within summons came to my hand on the seventh day of August, 1901, and was duly served on the within named defendant, J. B. Dawson, at his home on the Vermejo in Colfax County, New Mexico, by delivering a true copy of said summons to said defendant on the fifteenth day of August, 1901. I further certify and return that defendant, Charles Springer, accepted service of the within summons on the thirteenth day of August, 1901. I further return that I served a true copy of said summons on said defendant, Charles Springer, by delivering a true copy of said summons to O. Shenefield, who is residing at the usual place of abode of said defendant; said defendant being absent therefrom, on the twentieth day of August, 1901.

ROBT. B. CAMPBELL, *Sheriff.*
By W. E. CORBETT, *Deputy.*

Fees $2.50.

And afterwards to wit: On the twentieth day of September, 1901, there was filed in said clerk's office, a motion for a change of venue, and affidavits accompanying same, in words and figures as follows:

TERRITORY OF NEW MEXICO, *County of Colfax:*

In the District Court for the Fourth Judicial District of New Mexico in and for said County.

No. 2270.

JOSEPH M. CUNNINGHAM, Trustee, ET AL., Plaintiffs,
10 *vs.*
CHARLES SPRINGER and JOHN B. DAWSON, Defendants.

Charles Springer and John B. Dawson, being each duly sworn, upon their oaths, do severally depose and say, that they are the defendants in the above entitled cause; that they believe that they cannot obtain a fair trial in the said cause in the County of Colfax, where the same is now pending, because the inhabitants of said county are prejudiced against said defendants, and because by reason of local prejudice in said county in regard to the case and the questions involved therein an impartial jury cannot be obtained in said county to try the same. And they further state that the same prejudice against the said defendants exists in the County of Union.

CHARLES SPRINGER.
JOHN B. DAWSON.

Subscribed and sworn to before me this seventeenth day of September, 1901.

J. P. BRACKETT,
[SEAL.] *Notary Public.*

TERRITORY OF NEW MEXICO, *County of Colfax:*

Christopher N. Blackwell and Robert W. Maize, being first duly sworn, upon their oaths, do severally depose and say: That they have no interest in the above entitled cause; that they have heard read the affidavit of Charles Springer and John B. Dawson therein above appearing, and that they believe the facts therein stated are true.

CHRISTOPHER N. BLACKWELL.
ROBERT W. MAIZE.

Subscribed and sworn to before me this seventeenth day of September, 1901.

J. P. BRACKETT,
[SEAL.] *Notary Public.*

11 The defendants, upon the foregoing affidavits, move the court to change the venue in the above entitled cause to some county free from exception

CHARLES A. SPIESS,
FRANK SPRINGER,
Attorneys for Defendants.

And afterwards to wit: On the fourth day of October, 1901, there was filed in said clerk's office an answer of the defendants in words and figures as follows to wit:

TERRITORY OF NEW MEXICO, *County of Colfax:*

In the District Court for the Fourth Judicial District, Territory of New Mexico, County of Colfax.

No. 2270.

JOSEPH M. CUNNINGHAM, Trustee, IDA M. JONES, and ANDRIEUS A. JONES, Plaintiffs,
vs.
CHARLES SPRINGER and JOHN B. DAWSON, Defendants.

1. Now come the defendants in the above entitled cause and for answer to the complaint of the plaintiffs therein deny each and every allegation in said complaint contained.
2. And for further answer to said complaint defendants say: That before the commencement of this action they paid the demand for the recovery of which this action is brought.
3. And for a further answer to said complaint defendants say that this action was not commenced within four years from the time the cause of action therein accrued.

CHAS. A. SPIESS,
FRANK SPRINGER,
Attorneys for Defendants, East Las Vegas, N. M.

And afterwards to wit: On the tenth day of October, 1901,
12 there was filed in said clerk's office an order changing the venue of said cause to San Miguel County, New Mexico, in words and figures as follows, to wit:

TERRITORY OF NEW MEXICO, *County of Colfax:*

In the District Court for the Fourth Judicial District, Territory of New Mexico, County of Colfax.

No. 2270.

JOSEPH M. CUNNINGHAM, Trustee, IDA M. JONES, and ANDRIEUS A. JONES, Plaintiffs,
vs.
CHARLES SPRINGER and JOHN B. DAWSON, Defendants.

Now on this day this cause coming on to be heard upon the motion of the defendants heretofore filed in the said cause for a change of venue in said cause: the court after hearing A. A. Jones, of counsel for plaintiffs, and Charles A. Spiess of counsel for defendants, doth

order that the venue in said cause be changed from the County of Colfax, to the County of San Miguel, and that the clerk of this court make the necessary transcript.

Dated this eighth day of October, 1901.

WILLIAM J. MILLS,
Chief Justice, etc.

And afterwards to wit: On the twenty-first day of October, 1901, there was filed in said clerk's office a reply of plaintiffs, in words and figures as follows, to wit:

In the District Court of the Fourth Judicial District of the Territory of New Mexico, Sitting Within and for the County of Colfax.

Venue Changed to San Miguel County.

No. 2270–5464.

JOSEPH M. CUNNINGHAM, Trustee, IDA M. JONES, ANDRIEUS A. JONES, Plaintiffs,

vs.

CHARLES SPRINGER and JOHN B. DAWSON, Defendants.

Now comes the plaintiff- in the above entitled cause and for reply to the answer of said defendants to the complaint herein deny
13 each and every allegation contained in the second and third paragraphs of said answer.

E. A. FISKE,
Santa Fe, N. M.,
A. A. JONES,
Las Vegas, N. M.,
Attorneys for Plaintiffs.

At a regular term of the District Court for the Fourth Judicial District, Territory of New Mexico, begun and held in the County of San Miguel, in the Town of Las Vegas, in the court house of said County, beginning on Monday, November eleventh, 1901, for the trial of causes arising under the laws of the Territory of New Mexico.

Present: Honorable William J. Mills, Chief Justice, etc., Hon. Charles A. Spiess, District Attorney, Hon. Cleofes Romero, Sheriff, Hon. Secundino Romero, Clerk.

And afterwards to wit: On Tuesday, November twenty-sixth, 1901, the same being the fourteenth day of said term of court, the following among other proceedings were had to wit:

No. 5464.

JOSEPH M. CUNNINGHAM, Trustee, IDA M. JONES, and ANDRIEUS A. JONES, Plaintiffs,
vs.
CHARLES SPRINGER and JOHN B. DAWSON, Defendants.

Comes now the plaintiffs in the above entitled cause by their counsel, and waive a jury trial.

Comes now Neill B. Field, Esq., and enters his appearance for the plaintiffs.

Comes now Thomas B. Catron, Esq., and enters his appearance for the defendants.

Comes now the defendants by their counsel and demand a trial by jury.

Come again the parties in the above entitled cause by their
14 respective counsel, and this case is now called for trial; and thereupon, comes the following named jury to wit:

1. Gomecindo Ortiz. 2. Juan Jose Salazer. 3. Prospero Baca. 4. Clemente Segura. 5. Francisco Wallace. 6. Jesus Maria Romero. 7. Blaz Ortiz. 8. Abado Garcia. 9. Rumaldo Trujillo. 10. David Urioste. 11. Felipe Rivera y Martinez. 12. Jose A. Baca.

Twelve good and lawful men taken from the body of the County of San Miguel, who being duly sworn the truth to speak upon the issues joined between the parties, hear a portion of the evidence and under the instructions of the court said jury in charge of sworn bailiffs in this case retire for the night.

And afterwards to wit: On Wednesday, November twenty-seventh, 1901, the same being the fifteenth day of said term of court, the following, among other, proceedings were had to wit:

No. 5464.

JOSEPH M. CUNNINGHAM, Trustee, ET AL., Plaintiffs,
vs.
CHARLES SPRINGER ET AL., Defendants.

Complaint.

Come now the plaintiffs in the above entitled cause by E. A. Fiske and N. B. Field, their counsel; and come the defendants by Thomas B. Catron, Frank Springer and Charles A. Spiess; comes also the jury heretofore empaneled and hear further testimony in this case, and said jury now under the instructions of the court retire for the night in charge of sworn bailiffs in said cause.

And afterwards on Wednesday, November twenty-eighth, 1901, the same being the sixteenth day of said term of said court, the following among other proceedings were had to wit:

No. 5464.

JOSEPH M. CUNNINGHAM, Trustee, ET AL.,
vs.
CHARLES SPRINGER ET AL.

15 Come now the parties in the above entitled cause by their respective counsel, and come also the jury heretofore empaneled and hears further testimony in this cause, and said jury now, under the instructions of the court, retire for the night.

Come again the parties by their respective counsel and the jury now hears further testimony in this case and under the instructions of the court said jury now retire for the night in charge of sworn bailiffs in the case.

And afterwards to wit: On Saturday, November thirty, 1901, the same being the eighteenth day of said term of court, the following among other proceedings were had to wit:

No. 5464.

J. M. CUNNINGHAM, Trustee, ET AL., Plaintiffs,
vs.
CHARLES SPRINGER and JOHN B. DAWSON, Defendants.

Complaint.

Come now the parties in the above entitled cause by their respective counsel and comes also the jury heretofore empaneled and hears the remainder of the evidence in this case and the instructions of the court.

Plaintiffs by their counsel now except to each instruction given by the court of its own motion, and for failure of the court to give instructions asked by plaintiff which were not given.

Defendants by their counsel except to each instruction given by the court of its own motion, and for giving those asked for by plaintiff, which were given, and for failure to give those instructions asked for by defendants, which were not given.

The respective counsel now argue said case to the jury, and said jury after hearing the respective arguments, retire to deliberate on their verdict, and having duly deliberated thereon now return into court their verdict, which said verdict is in words and figures as follows to wit:

In the District Court, Fourth Judicial District, Territory of New Mexico, County of San Miguel.

16 No. 5464.

JOSEPH M. CUNNINGHAM, Trustee, IDA M. JONES, ANDRIEUS A. JONES, Plaintiffs,

vs.

CHARLES SPRINGER and JOHN B. DAWSON, Defendants.

We, the jury in the above entitled cause, find the issues in favor of the defendants.

JUAN JOSE SALAZAR, *Foreman.*

Plaintiffs, by their counsel, now move that said jury be polled. Said motion is granted and said jury is now polled, and each juror replies that it is his verdict.

It is therefore ordered and adjudged by the court that plaintiffs herein, Joseph M. Cunningham, trustee, Ida M. Jones and Andrieus A. Jones, take nothing by their said action, and that the respective defendants go hence without day.

It is further ordered by the court that plaintiffs herein pay the costs to be taxed by the clerk of this court and that execution issue therefore.

Come now the plaintiffs by their counsel and give notice that they will file motion for a new trial.

And afterwards to wit: On Wednesday, December fourth, 1901, the same being the twenty-first day of said term of court, the following, among other proceedings, were had to wit:

No. 5464.

JOSEPH M. CUNNINGHAM, Trustee, ET AL.,

vs.

CHARLES SPRINGER ET AL.

Now come the plaintiffs in the above entitled cause by their counsel and file motion for a new trial herein.

Said motion for a new trial being in words and figures as set forth in the bill of exceptions hereinafter set forth:

In the District Court, Fourth Judicial District, Territory of New Mexico, County of San Miguel.

No. 5464.

JOSEPH M. CUNNINGHAM, Trustee, ET AL.,
vs.
CHARLES SPRINGER ET AL.

17 Now come the plaintiffs in the above entitled cause and file their motion for a new trial herein, and move the court for an extension of time, until January fourth, 1902, within which to file an amended motion for a new trial herein; and it appearing to the court that there is good cause for said motion:

It is therefore ordered that said plaintiffs be and they hereby are granted time until January fourth, 1902, within which to file such amended motion for a new trial and affidavits herein; and that such amendment and affidavits when so filed shall be filed *nunc pro tunc* as of this date and shall have the same force and effect as if filed at this time.

It is further ordered that in pursuance of said stipulation filed in this cause the said motion as amended may be taken up, heard and decided upon five days' notice from either party to the opposite party, with the same effect as if decided this day.

Dated December fourth, 1901.

WILLIAM J. MILLS,
Chief Justice, etc.

And afterwards to wit: On the twenty-eighth day of December, A. D. 1901, there was filed in said clerk's office an order in words and figures as follows, to wit:

District Court, Fourth Judicial District, Territory of New Mexico, County of San Miguel.

No. 5464.

J. M. CUNNINGHAM ET AL., Plaintiffs,
vs.
CHARLES SPRINGER ET AL., Defendants.

Now come the plaintiffs in the above entitled cause and move the court for an extension of time within which to file an amended motion for a new trial herein, and affidavits in support of the motion for a new trial; and also for a continuance of the hearing and argument of said motion; and the parties to said cause appearing by their respective counsel; and good cause therefor being shown:

18 It is therefore ordered, that said plaintiffs be, and they hereby are granted time until January 25th, 1902, within which to file such amended motion for a new trial, and

affidavits herein, and that such amendment and affidavits when so filed shall be filed *nunc pro tunc* as of date December fourth, 1901, and shall have the same force and effect as if filed on said date.

It is further ordered, good cause therefore being shown, that said motion as it may be amended, be taken up, heard and decided on the first day of February, 1902, with the same effect as if decided December fourth, 1901.

Dated this twenty-eighth day of December, A. D. 1901.

WILLIAM J. MILLS,
Chief Justice, etc.

And afterwards, to wit, on the 27th day of January, 1901, there was filed in said clerk's office the affidavit of Neill B. Field, in words and figures as follows, to wit:

TERRITORY OF NEW MEXICO, *San Miguel County:*

District Court.

No. 5464.

JOSEPH M. CUNNINGHAM, Trustee, ET AL., Plaintiffs,
vs.
CHARLES SPRINGER ET AL., Defendants.

Affidavit of Neill B. Field in Support of Motion for a New Trial.

Affidavit, Neill B. Field, of lawful age, being first duly sworn on his oath, says: That he was of counsel for plaintiffs on the trial of the above entitled cause: and that shortly after the conclusion of the evidence, the Hon. W. J. Mills, Chief Justice, who presided at said cause, asked affiant and Charles A. Spiess, of counsel for the defendant, how much time would be requisite, or was desired by counsel, for the argument of said cause to the jury; that this
19 affiant thereupon stated to the Chief Justice that he could not say definitely how much time would be required, but he hoped very much that the time for the argument would not be limited, as the case was one of great importance, and ought to be fully presented to the jury. The said Charles A. Spiess stated that in his opinion two hours and a half on a side ought to be sufficient for the argument. The Chief Justice then stated that he would limit the argument to two and a half hours on a side, but if this affiant found that more time was necessary to enable him to properly present the closing argument to the jury, he, the Chief Justice, would endeavor to give it to affiant.

Affiant further states that the last argument on behalf of defendants in the said cause was concluded at about 10:30 o'clock p. m. of Saturday, November 30th, 1901; that there remained to this affiant about one hour and a half of time in order to close the argument within the time limit of two hours and a half fixed by the said Chief Justice; that it was evident that the jury was tired, and that affiant

was tired, and in no condition to conclude the argument that night, and asked that the court might adjourn until the following Monday morning; to which the Chief Justice replied in substance and effect that the argument must be concluded that night, and that he thought it would be a great wrong to other litigants in that court to permit the case to be run over into the following week. Affiant thereupon proceeded to argue the case to the jury on behalf of the plaintiffs, and after affiant had continued for a period of one hour and a half, affiant's colleague having consumed one hour, the Chief Justice called affiant's attention to the fact that his time had expired, but stated that he might proceed for five minutes if he desired to do so. Affiant then stated to the Chief Justice that he had not half covered the case, and that five minutes would be of no earthly use to him except to enable him to explain to the jury his reason for closing the argument, and affiant thereupon closed the argument to the jury, it being then a few minutes after 12 o'clock, midnight, and the jury retired to consider their verdict.

Affiant further stated that no other cases were tried by the jury after the conclusion of the trial in the above entitled case, and that the jury were kept in attendance upon the court unoccupied during the Monday and Tuesday following, but affiant is informed that there was a criminal case set for trial on Monday and another Tuesday, and that the defendant in each case pleaded guilty when his case was called for trial.

Affiant further states that by reason of affiant's exhausted condition, and the lateness of the hour, affiant was, in his opinion, utterly unable to do justice to the plaintiff's case, and the members of the jury were likewise not in condition to properly consider the case, and further affiant saith not.

NEILL B. FIELD.

Subscribed and sworn to before me by Neill B. Field, this 21st day of January, 1902.

JOSE D. SENA,
Clerk of Supreme Court.

[SEAL.]

And afterwards to wit: On the thirtieth day of October, 1902, there was filed in said clerk's office an order of the court overruling plaintiff's motion for a new trial, in words and figures as follows, to wit:

In Vacation.

In the District Court, Territory of New Mexico, County of San Miguel. In Vacation.

No. 5464.

J. M. CUNNINGHAM, Trustee, ET AL.
vs.
CHARLES SPRINGER ET AL.

Order Overruling Motion for New Trial.

This cause coming on to be heard upon the motion hereto-
21 fore filed therein, asking that the verdict heretofore entered in said cause be set aside and a new trial granted, and the court having heard Neill B. Field, Esq., of counsel for the plaintiff, and Charles A. Spiess of counsel for the defendants, and having duly read and considered the briefs filed by both the plaintiffs and the defendants in support of and against said motion, and being duly advised in the premises:

Does hereby order, adjudge and decree that the said motion be and the same is hereby overruled and denied, to the overruling of which motion the plaintiffs hereby duly except.

Las Vegas, N. M., August nineteenth, 1902.

WILLIAM J. MILLS,
Chief Justice, etc.

And be it further remembered, that afterwards to wit: On the thirtieth day of October, 1902, there was filed in the office of the clerk of said court, the following judgment, to wit:

In Vacation.

TERRITORY OF NEW MEXICO, *County of San Miguel:*

In the District Court, Fourth Judicial District, in and for said County.

No. 5464.

J. M. CUNNINGHAM, Trustee, ET AL., Plaintiffs,
vs.
CHARLES SPRINGER, JOHN B. DAWSON ET AL.

This cause coming on for judgment upon the verdict of the jury, plaintiff's motion for a new trial having at a former day been overruled and denied: It is now, on motion of the defendants, hereby considered and adjudged that the plaintiffs take nothing by their action in this case and that the defendants go hence without day.

And it is further ordered and adjudged that the defendants
22 do have and recover of the plaintiffs their costs in this case to be taxed and that execution issue therefor.

Dated Las Vegas, New Mexico, October twenty-seventh, 1902.

WILLIAM J. MILLS,
Chief Justice.

Be it remembered, That on November twenty-fourth, 1903, there was filed in said clerk's office, a Bill of Exceptions, which said bill of exceptions is in words and figures as follows, to wit:

No. 5464.

JOSEPH M. CUNNINGHAM, Trustee, IDA M. JONES, ANDRIEUS A. JONES, Plaintiffs,
vs.
CHARLES SPRINGER, JOHN B. DAWSON, Defendants.

Filed in open court this twenty-fourth day of November, 1903.
SECUNDINO ROMERO, *Clerk.*

Bill of Exceptions.

Be It Remembered, That on the trial of this cause the plaintiffs introduced evidence tending to show that on the twenty-third day of September, 1891, the Maxwell Land Grant Company commenced an action in the District Court of Colfax County, New Mexico, *vs.* the defendant, John B. Dawson, for the recovery of a tract of land within the exterior boundaries of the Maxwell Land Grant; the issues in said action being made and joined upon the following pleadings:

TERRITORY OF NEW MEXICO, *County of Colfax:*

In the District Court of said Territory of New Mexico for the said County of Colfax, at the October Term, A. D. 1891, Thereof.

To the Honorable James O'Brien, Chief Justice of the Supreme Court of said Territory and Judge of said District Court:

The Maxwell Land Grant Company, a corporation or-
23 ganized and existing under the laws of the Kingdom of the Netherlands, and doing business within the Territory of New Mexico, in conformity with the laws thereof, and having its principal place of business in said Territory, in the County of Colfax, plaintiff, complains of John B. Dawson, a resident of said County of Colfax, defendant, in a plea of ejectment.

For, That Whereas, heretofore to wit, on the first day of January, A. D. 1891, at the County of Colfax aforesaid, plaintiff was entitled to the possession of that certain tract of land commonly known as the Beaubien and Miranda Grant, or the Maxwell Grant, situate

principally in the said County of Colfax and partly in the County of Taos in said Territory, and partly in the state of Colorado, which said tract of land is described as follows:

Commencing below the junction of the Rayado and Red Rivers; from thence in a direct line to the east to the first hills; from thence, following the course of the Red river in a northerly direction, to the junction of the Una de Gato with Red river; from thence, following along said hills to the east of the Una de Gato river, to the summit of the tableland (mesa); from whence, turning northwest, following said summit to the summit of the mountain which separates the waters of the rivers which run towards the east from those which run to the west; from thence, following the summit of said mountain in a southerly direction, to the first hill east of the Rayado river; from thence, following along the brow of said hill to the place of beginning. Being the same lands described in a patent of the United States, issued by the President of the United States to Charles Beaubien and Guadalupe Miranda, their heirs and assigns, dated the nineteenth day of May, A. D. 1879, and recorded in Deed Book B, pages 210 to 229 inclusive, of the records of said Colfax County.

And afterwards, to wit, on the day and year aforesaid, the
24 said defendant entered into said premises and unlawfully withheld, and thence hitherto hath unlawfully withheld, and still doth unlawfully withhold from the plaintiff, the possession of that portion thereof situate in said County of Colfax, and bounded on the north by the northern boundary of the Territory of New Mexico, to its damage, in the sum of five hundred dollars. And plaintiff avers that the monthly value of the rents and profits of said premises is five hundred dollars.

Wherefore plaintiff brings suit, and prays judgment of this Honorable Court for the recovery of the possession of said premises, and for the sum of five hundred dollars, its damage aforesaid, and the sum of five hundred dollars per month from the present time until it is let into possession, and for the costs of this suit.

FRANK SPRINGER,
Attorney for Plaintiff.

And afterwards, to wit, on the twenty-first day of April, A. D. 1892, there was filed in the office of said clerk pleas of the defendant, in words and figures as follows, to wit:

District Court, Fourth Judicial District, County of San Miguel, Territory of New Mexico.

No. 4123.

THE MAXWELL LAND GRANT COMPANY
vs.
JOHN B. DAWSON.

Ejectment.

Comes now said defendant, by A. A. Jones, his attorney, and defends the wrong, injury and the unlawful withholding the possession of the lands and premises, when, etc., and for his plea herein says: That said plaintiff ought not to have or maintain its aforesaid action against him, because he says that he is not guilty of all or any of the supposed wrongs, injuries or the unlawful withholding of possession which the said plaintiff hath above thereof complained against this defendant; and of this the said defendant puts himself upon the country, etc.

A. A. JONES,
Attorney for Defendant.

And the said plaintiff doth the like.

FRANK SPRINGER,
Attorney for Plaintiff.

And the defendant, John B. Dawson, by his attorney, A. A. Jones, Esq., and by leave of the Court first had and obtained, files his additional pleas, and, taking defense for the particular tract of land owned and occupied by him, says: He disclaims for himself as to all lands lying within the boundaries of the tract of land described in plaintiff's declaration, except those certain lands and real estate lying and being in the county of Colfax and the Territory of New Mexico, and described as follows, to wit:

All the land in the valley or drainage of the Vermejo river, in the County of Colfax, Territory of New Mexico, within the following boundaries:

Commencing at the dam on said river, at the upper end of John B. Dawson's farm, thence running to a high point of rocks on the north side of the Vermejo canyon; thence following along the top of the divide west of Rail canyon to the head of Saltpeter canyon; thence down along the top of the divide east of Saltpeter canyon to a point on a line with said John B. Dawson's rock fence; thence, following the line of said rock fence across the Vermejo, to the top of the divide between the Vermejo and Van Bremmer canyon; thence, following the top of said divide to the head of Coal Canyon, and thence along the top of the divide east of Coal canyon to a point on said divide nearest the place of beginning; thence, to the place of beginning.

Which tract of land is more particularly described as follows, to wit:

Beginning at a certain dam on the Vermejo river, in the
26 County of Colfax, Territory of New Mexico, which dam is south seven degrees E., a distance of eight hundred and seventy-four feet from the corner to sections numbered two, three, ten and eleven, in township number twenty-eight north of range number twenty east, according to the United States Government surveys; thence on course north thirty-six degrees east, a distance of 2,934 feet, to a certain high point of rocks on the north side of the Vermejo canyon; thence on a meandering line, following the summit of the divide west of the canyon known as Rail caynon, to a point where said divide joins the divide west of Saltpeter canyon, at which point there is a pile of rocks; thence, following along the summit of said last mentioned divide, round the head of Saltpeter canyon and down along the summit of the divide east of Saltpeter canyon, to a point where the extended line of the stone wall or fence which is said John B. Dawson's lower boundary line intersects said last mentioned divide, at which point there is a pile of rocks; thence on course south fifty degrees west being the line and course of said rock wall or fence, across the valley and drainage of the Vermejo, to the top of the divide between the Vermejo canyon and the Van Bremmer canyon, at which point there is a pile of rocks; thence, following along the summit of said last mentioned divide, round the head of the canyon known as Coal canyon and down along the summit of the divide east of Coal canyon, to a point opposite said dam; thence, to the place of beginning; which said tract of land includes only the land from which the water drains into the Vermejo river between the said dam and said rock fence and the drainage of the canyons known as Saltpeter canyon, Spring canyon and Lacy canyon, which lies above the line of said rock fence; all of which canyons drain into the Vermejo river between the said dam and the lower line of the improvements on which was known as the O'Donnell farm.

27 And, to such lands, the said defendant, John B. Dawson, by his attorney aforesaid, comes and defends the force and injury when, etc., and says he is not guilty of the said supposed trespass and ejectment above laid to his charge, or of any part thereof, in manner and form as said plaintiff hath above complained against him; and of this the said defendant puts hismelf upon the country.

A. A. JONES,
Attorney for Defendant.

And for a third plea in this behalf, as to said supposed trespass and ejectment in said declaration mentioned, the said defendant, by leave of the Court first had and obtained, and according to the form of the statute in such case made and provided, says: That plaintiff ought not to have and maintain his aforesaid action, because he says that he is not guilty of the said supposed trespass and ejectment in said declaration mentioned, or of any or either of them, or of any part

thereof, in manner and form as the said plaintiff hath above complained against him, on the land described in the foregoing plea, and for which defense is taken by this defendant at any time within ten years next before the commencement of this suit; and this the defendant is ready to verify. Wherefore he prays judgment if the said plaintiff ought to have or maintain its aforesaid action against him.

And for a fourth plea in this behalf, as to said supposed trespass and ejectment in the said declaration mentioned, the said defendant, by leave of the Court first had and obtained, according to the form and statute in that case made and provided, says: That plaintiff ought not to have and maintain its aforesaid action against him, the said defendant, as to the lands and premises described in the first foregoing additional plea, because he says that he has withheld from the said plaintiff the possession of the lands and premises aforesaid for more than ten years next before the commencement of this suit, and that plaintiff's right to commence its aforesaid action for
28 the recovery of the possession of said land and real estate accrued more than ten years next before the commencement of this suit. Wherefore he prays judgment if the said plaintiff ought to have or maintain its aforesaid action against him.

A. A. JONES,
Attorney for Defendant.

Replication.

TERRITORY OF NEW MEXICO, *County of Colfax:*

In the District Court for the Fourth Judicial District.

THE MAXWELL LAND GRANT COMPANY
vs.
JOHN B. DAWSON.

Replication of the Plaintiff to Second, Third and Fourth Pleas.

And the said plaintiff, as to the said plea of the said defendant by him secondly above pleaded, whereof he hath put himself upon the country, doeth the like; except as to so much of the land in said plea mentioned and described, on both sides of the Vermejo river, as lies within the following boundaries, to wit: Beginning at the dam on said river, at the upper end of John B. Dawson's farm; thence, to the right hand point of rocks about three-fourths of a mile east of said dam, on the north side of the Vermejo river; thence down said river, in a straight line, to the northeastern end of the rock fence at the lower end of John B. Dawson's farm, as the same is now constructed; thence southwesterly, following said rock fence across said river, to the end of said fence; thence up said river, in a straight line, to the place of beginning, at said dam; which said last mentioned tract of land plaintiff admits to be the property of defendant.

T. B. CATRON,
FRANK SPRINGER,
Attorneys for Plaintiff.

29 And the said plaintiff, as to the said plea of the said defendant by him thirdly above pleaded, saith *precludi non,* because it saith that the said defendant is guilty of the said trespass and ejectment in said declaration mentioned, in manner and form as the said plaintiff hath above complained against him, on the land described in the said plea secondly above pleaded, and for which defense is taken by the said defendant, except as to the tract of land in the foregoing replication admitted to be the property of defendant, to wit, within ten years next before the commencement of this suit; and this the plaintiff prays may be inquired of by the country.

T. B. CATRON,
FRANK SPRINGER,
Attorneys for Plaintiff.

And the said defendant doth the like.

A. A. JONES,
Attorney for Defendant.

And the plaintiff, as to the said plea of the said defendant by him fourthly above pleaded, sath *precludi non,* because it saith that the said defendant hath not withheld from the said plaintiff the possession of the land and premises in said plea mentioned for more than ten years next before the commencement of this suit, and that the said plaintiff's right to commence its said action for the recovery of the possession of said land and real estate did accrue to the said plaintiff within ten years next before the commencement of this suit, except as to the tract of land in the first foregoing replication, admitted to be the property of defendant; and this the plaintiff prays may be inquired of by the country.

T. B. CATRON,
FRANK SPRINGER,
Attorneys for Plaintiff.

And the said defendant doth the like.

A. A. JONES,
Attorney for Defendant.

30 The evidence on behalf of the plaintiff also tended to show that the said action of ejectment was taken on change of venue to the District Court of San Miguel County and was there tried to a jury, trial having been commenced on the second day of May, 1892, and having been continued with night sessions of the Court until the eleventh day of May, 1892, when there was a verdict rendered therein on behalf of the defendant, that a motion for a new trial was filed by the plaintiff and overruled, and thereupon the case was carried to the Supreme Court of the Territory of New Mexico, which court on the fifteenth day of August, 1893, affirmed the judgment of the court below, that thereafter the said case was taken by writ of error to the Supreme Court of the United States, which court on the 5th day of February, 1894, reversed the judgment of the courts below and directed that a new trial be granted to the plaintiff, the Maxwell Land Grant Company. The testimony also tended to

show that after the reversal of the judgment of the Supreme Court of the United States, the plaintiff, A. A. Jones, at the instance of the defendant, Charles Springer, prepared an application for rehearing to be presented to the said Supreme Court of the United States and journeyed to Washington for the purpose of filing the same, that before filing the said application for rehearing, the plaintiff, A. A. Jones, at the instance of the defendant, Charles Springer, conferred with Mr. Brown, a member of the Bar of the Supreme Court of the United States, who, after said conference, made some additions to the petition for rehearing made by the plaintiff, A. A. Jones, and the said petition for rehearing was filed and denied by the court. The evidence also tended to show that thereafter in regular course, according to the practice of said Court, the said action of ejectment was remanded to the District Court of San Miguel County and was again tried to a jury, the trial having been begun on the fifteenth
31 day of May, 1896, and continued daily, with night sessions of the court, until the twenty-seventh day of May, 1896, when there was a verdict for the defendant, John B. Dawson.

The evidence also tended to show that a motion for new trial was filed by the plaintiff and overruled by the court, and that the case was again carried by the Maxwell Land Grant Company to the Supreme Court of the Territory of New Mexico, the same being returnable to the July term, 1897, of that court.

The evidence also tended to show that before the said cause was heard by the Supreme Court of the Territory the plaintiff, A. A. Jones, called to the attention of Mr. Frank Springer, counsel for the Maxwell Land Grant Company, the fact that the record as returned into the Supreme Court of the Territory of New Mexico would not, as claimed by the plaintiff, A. A. Jones, permit the said Supreme Court to review and pass upon the questions which the Maxwell Land Grant Company sought to have reviewed in the case, and thereafter the writ of error sued out by the Maxwell Land Grant Company was dismissed on its motion and the judgment in favor of the defendant, John B. Dawson, in the said action of ejectment, became final and not subject to further review.

The evidence on behalf of the plaintiff also tended to show that before the institution of said action of ejectment, a contract in writing had been entered into between Charles Springer and John B. Dawson, which contract was admitted in evidence and is as follows, to wit:

This Indenture, Made the twentieth day of May, A. D. 1891, by and between John B. Dawson, and Lavina J. Dawson, his wife, of the County of Colfax, Territory of New Mexico, parties of the first part, and Charles Springer, of the same County and Territory of the second part:

Witnesseth: That the said parties of the first part, for and
32 in consideration of the sum of one dollar to them in hand paid the receipt whereof is hereby acknowledged, and in further consideration of the agreements and undertakings of the said party of the second part hereinafter mentioned, have granted, bargained and sold, and do by these presents grant, bargain and sell

and convey unto the said party of the second part, his heirs and assigns:

One-half of all the coal, coal oil, fire clay, and all other minerals or mineral substances whether base or precious, in and upon the following described lands, situate on both sides of the Vermejo river in Colfax County, New Mexico, to wit:

Commencing at the upper dam on said John B. Dawson's farm; thence, running in a northerly direction to a high point of rocks, about seven hundred yards from said dam; thence, following the summit of the divide between the canyon known as Rail canyon, with its tributaries, and the canyons known as Doe canyon, Stout canyon and Saltpeter canyon with their tributaries, around to a point where the rock fence which separates the Dawson place from the Lacy place joins the bluff on the north side of the Vermejo river; thence across said river following the line of said fence to a point where it joins the bluff on the south side; thence following the summit of the divide between the canyon known as Coal canyon, with its tributaries, and the canyons known as the Lacy canyon, the Van Bremmer canyon, and Stag canyon, with their tributaries, around to the place of beginning; including all the land from which the water drains into the valley of the Vermejo river between the said dam and the said rock fence, together with the right of way through and over said lands for all roads, tramways and railways necessary for the advantageous working of said minerals and mineral substances.

And the said Charles Springer, does hereby covenant and
33 agree that he will give his time and services, to the best of his skill and ability to making advantageous arrangements for the development of said coal mines and mineral substances; and for bringing the same into market and finding purchasers therefor, and that he will also, at his own expense, employ and furnish the necessary counsel and surveyors and pay all court costs in all suits or proceedings for the defense or protection of the title to said lands against all claims adverse to the parties of the first part or those claiming under them.

Witness our hands and seals the day and year first above written.

JOHN B. DAWSON. [SEAL.]
LAVINA J. DAWSON. [SEAL.]
CHARLES SPRINGER. [SEAL.]

TERRITORY OF NEW MEXICO, *County of Colfax:*

Be it Remembered, That on the 20th day of May, A. D. 1891, before me, the undersigned, a Justice of the Peace, within and for the said County in the Territory aforesaid, personally appeared John B. Dawson, and Lavinia J. Dawson, his wife, and Charles Springer, known to me to be the identical persons whose names are subscribed to the foregoing instrument of writing, as parties thereto, and acknowledged that they executed the same voluntarily for the uses and purposes therein set forth; and the said Lavina J. Dawson, in an examination separate and apart from her said husband, being by me first informed of the contents of said instrument did acknowledge

that she executed the same voluntarily and without the compulsion or the illicit influence of her husband.

In Testimony Whereof, I have hereunto set my hand this twentieth day of May, A. D. 1891.

JESUS MA. CORDOBA,
Justice of the Peace.

Precinct No. 17, Colfax County, N. M.

34 TERRITORY OF NEW MEXICO, *County of Colfax:*

I, M. M. Salazar, clerk of the Probate Court of the County of Colfax, which is a court of record, having a seal, and *ex officio* recorder and clerk of said County, do hereby certify: That Jesus Ma. Cordoba, whose name is subscribed to the certificate or proof of acknowledgement of the annexed instrument, and therein written, was, at the time of taking of such proof and acknowledgement, a Justice of the Peace for and in the County of Colfax, duly elected and qualified, and duly authorized to take the same. And further: That I am well acquainted with the handwriting of such Justice of the Peace and verily believe that the signature to the said certificate or proof of acknowledgment is genuine. I further certify that the said instrument is executed and acknowledged according to the laws of this Territory.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Springer, this twenty-first day of October, A. D. 1891.

M. M. SALAZAR,
[SEAL.] *Clerk of Probate Court.*

The evidence also tended to show that after the second trial of the said action of ejectment in the District Court of San Miguel County, John B. Dawson and his wife made a conveyance to the defendant, Charles Springer, which was admitted in evidence and is as follows, to wit:

John B. Dawson and Wife to Charles Springer.

This Indenture, made this nineteenth day of October in the year one thousand, eight hundred and ninety-six, by and between John B. Dawson and Lavina J. Dawson, his wife, of the County of Colfax and Territory of New Mexico, parties of the first part; and Charles Springer, of said County and Territory, party of the second part:

Witnesseth: That for and in consideration of the sum of
35 five thousand dollars, to them in hand paid, the receipt whereof is hereby acknowledged, and for other good and valuable consideration passing between said parties at or before the ensealing and delivery of these presents, the said parties of the first part, have granted, bargained and sold, remised, released and conveyed, and do by these presents, grant, bargain and sell, remise, release, convey and confirm unto said party of the second part and to

his heirs and assigns forever an undivided one-half interest in and to the following described tract of land and real estate, situate, lying and being in the County of Colfax and Territory of New Mexico, towit:

That certain ranch and tract of land lying on both sides of the Vermejo river in said County, known as the Dawson ranch and particularly described as follows, to wit:

Commencing at the dam on said river at the upper end of the farm of John B. Dawson, which dam is south seven degrees east, a distance of eight hundred and seventy-four feet from the corner to sections numbered two, three, ten and eleven, in township number twenty-eight, north of range number twenty, east, according to the United States Government surveys; thence on a course north thirty-six degrees east, a distance of twenty-nine hundred and thirty-four feet, to a certain high point of rocks on the north side of the Vermejo canyon; thence, on a meandering line following the summit of the divide west of the canyon known as Rail canyon, to a point where said divide joins and intersects the divide next west of Saltpeter canyon, at which point there is a pile of rocks; thence, following along the summit of said last mentioned divide, round the head of Saltpeter canyon and down along the summit of the divide next east of Saltpeter canyon, to a point where the extended line of the stone wall or fence, which is on the lower boundary line of said John B. Dawson's farm, intersects said last mentioned divide, at which
36 point there is a pile of rocks; thence, on a course south fifty degrees west, being the line or course of said rock wall or fence, across the valley and drainage of the Vermejo river to the top of the divide between the Vermejo canyon and the Van Bremmer canyon at which point there is a pile of rocks; thence, following the summit of said last mentioned divide, round the head of the canyon known as Coal canyon or Dawson canyon, and down along the summit of the divide next east of said Coal or Dawson canyon to a point on said last mentioned divide opposite the place of beginning; thence, in a straight line to the place of beginning; which said tract of land includes the tract of land from which the water drains into the Vermejo river between said dam and said rock fence, and also the drainage of the canyon known as Spring canyon, Saltpeter canyon and Lacy canyon, which lies above the line of said rock fence:

Together with all and singular the lands, tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. And all the estate, right, title and interest, claim and demand whatsoever, either in law or in equity, of said parties of the first part, of, in and to the said half interest in the above described premises with the appurtenances.

To Have and to Hold all and singular the above granted half interest in said premises, unto the said party of the second part, his heirs and assigns forever.

And the said parties of the first part, for themselves, their heirs, executors and administrators, do covenant and agree to and with the said party of the second part, his heirs and assigns, that they will

forever warrant and defend the title to the property hereby conveyed against the lawful claims of every person claiming or to claim the same or any part thereof, by, through, or under them, the said parties of the first part.

In Witness Whereof, the said parties of the first part have
37 hereunto set their hands and seals the day and year above written.

JOHN B. DAWSON. [SEAL.]
LAVINA J. DAWSON. [SEAL.]

TERRITORY OF NEW MEXICO, *County of Colfax:*

On this twenty-ninth day of October, A. D. 1896, before me personally appeared John B. Dawson and Lavina J. Dawson, his wife, to me personally known to be the persons described in and who executed the foregoing instrument of writing, and they severally acknowledged that they executed the same as their free act and deed.

In Testimony Whereof, I have hereunto set my hand and affixed my seal notarial the day and year last above written.

A. H. OFFICER,
Notary Public.

[SEAL.]

Filed for record on this thirtieth day of October, A. D. 1896, at 9 o'clock a. m.

A. C. GUITERREZ,
P. C. and Recorder.

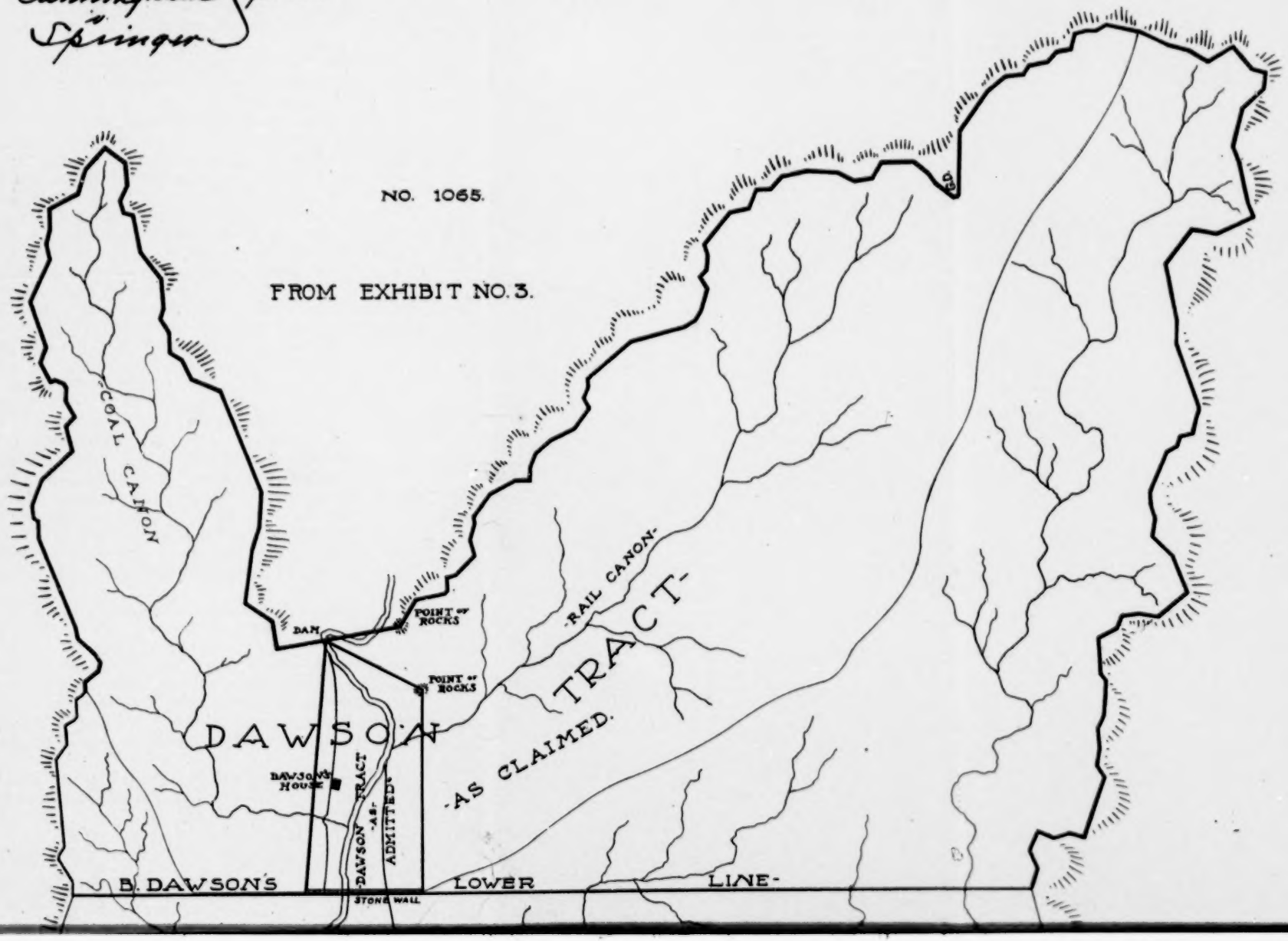
Recorded in Deed Book O, Page 474.

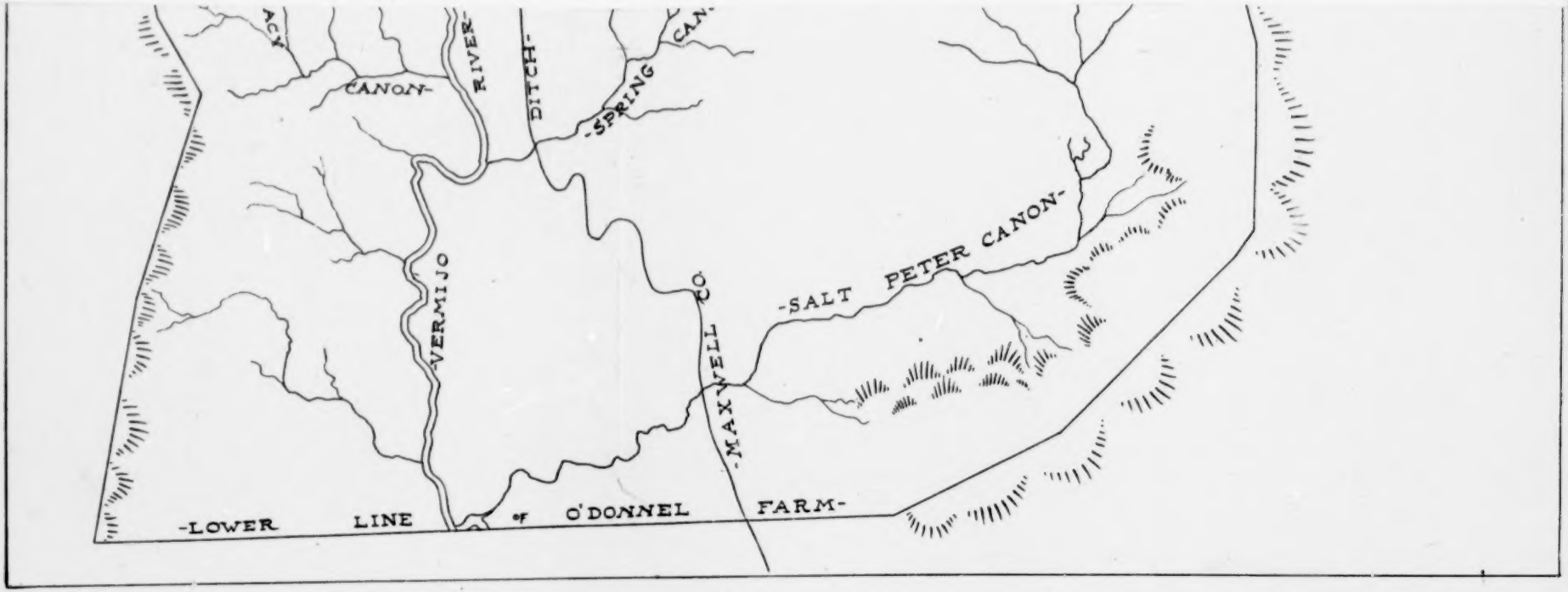
The evidence also tended to show that on the twenty-sixth day of May, A. D. 1900, the plaintiff, Ida M. Jones, commenced an action in the District Court of San Miguel County *vs.* the plaintiff, Andrieus A. Jones, for a divorce and such proceedings were had therein that on the twenty-sixth day of May, 1900, a decree of absolute divorce was granted to the plaintiff, Ida May Jones, and in and by the said decree, it was, among other things, provided that the claim of the plaintiff for services rendered in the said action of ejectment should be transferred to the plaintiff, Joseph M. Cunningham, trustee, and the proceeds thereof to be equally divided between the said plaintiff, Ida May Jones, and the plaintiff, A. A. Jones, when collected.

A map of the lands which were in controversy between the Maxwell Land Grant Company and the defendant, John B. Dawson, was offered in evidence and it was admitted without objection and is as follows, to wit:

(Here follows map marked p. 38.)

No. 146.
Cunningham } p. 38
Springer }




CANON
RIVER
DITCH
SPRING CAN.
VERMIJO
MAXWELL CO
SALT PETER CANON
LOWER LINE of O'DONNEL FARM

39 A deed from Lucien B. Maxwell and wife to John B. Dawson was admitted in evidence and is *is* follows, to wit:

This Indenture, made this, the seventeenth day of January, in the year one thousand, eight hundred and sixty-nine (1869) between Lucien B. Maxwell and Luz B. Maxwell, née Beaubien, of Mora County, Territory of New Mexico, of the first part; and John B. Dawson of the same County and Territory aforesaid, of the second part:

Witnesseth: That the said parties of the first part, for and in consideration of the sum of three thousand and seven hundred ($3,700) dollars, lawful money of the United States, to them in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents (the receipt of which is hereby acknowledged) have granted, bargained, sold, aliened, remised, released, conveyed and confirmed and by these presents do grant, bargain, sell, alien, remise, release, convey and confirm unto the said part of the second part; and to his heirs and assigns forever, all of the land or ground now suitable for farming or cultivating purposes, in the valley or drainage of the Vermejo river, County of Mora, Territory of New Mexico, within the following boundaries, to wit:

Beginning at a certain dam, at the head of a certain ditch, at the right hand point of rocks, from thence running down on the north side of said river to a certain other pile of rocks, on a knoll or elevation, with some bushes near thereto; thence running very near southward across said river to a pinon tree to the right of a ridge, near a wash, which tree is marked with the letter "L;" thence, running up said river on the south side to place of beginning; containing about — acres, more or less; together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, re-

40 mainder and remainders, rents, issues and profits thereof.

And, also, all the estate, right, title, interest, dower and right of dower, property possessions, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the above described premises and every part and parcel thereof, with all the appurtenances thereunto belonging, or in any wise appertaining.

To Have and to Hold, all and singular, the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns forever.

And the said Lucien B. Maxwell and the said Luz B. Maxwell, née Beaubien, for themselves and their heirs, the said premises in the quiet and peaceful possession of said party of the second part, and their heirs, and against all and every person whomsoever, lawfully claiming, or to claim, the same, shall and will warrant and forever defend.

In Witness Whereof, the said parties of the first part have hereunto set their hands and seals, the day and year above written.

L. B. MAXWELL. [SEAL.]
LUZ B. MAXWELL. [SEAL.]

($1.50 Rev. Stamps).

Signed, sealed and delivered in the presence of
CHAS. F. HOLLY,
JESUS G. ABREN.

TERRITORY OF NEW MEXICO, *County of Mora:*

Be it remembered that on this seventh day of January, A. D. 1869, before me, Nestor Martinez, a Justice of the Peace, within and for the County and Territory aforesaid, personally appeared Lucien B. Maxwell and Luz B. Maxwell, his wife, née Luz B. Beaubien, who are personally known to me to be the persons whose names are subscribed to the foregoing deeds as parties thereto, and they
41 severally, each for himself and herself, acknowledged that they executed the same voluntarily, for the uses and purposes therein mentioned.

I further certify that she, the said Luz B. Maxwell, née Luz Beaubien, was fully informed of the contents of said conveyance, and has confessed, on an examination, separate and independent from her said husband, that she executed the same voluntarily, and without the compulsion or the illicit influence of her said husband.

Witness my hand and date as above.

NESTOR MARTINEZ,
Justice of the Peace.

Recorded in Book Two (2) Records of Mora County, Pages 113 and 114. Twelfth of February, 1869.

ANDRIEUS A. JONES was sworn as witness on behalf of the plaintiffs and his testimony tended to show that on the tenth day of October, 1891, he was engaged in the practice of law at Las Vegas, in the Territory of New Mexico, and had been so engaged since the fourteenth day of May, 1888, on which day he was first admitted to the bar and on the last day mentioned, the defendant, Charles Springer, came to his office and told him that the Maxwell Land Grant Company was going to bring, or had brought, a suit against John B. Dawson, for his ranch in Colfax County, and wanted him to represent Mr. Dawson in that litigation; that Jones acquiesced, and thereupon Springer wanted to know what fee would be charged and Jones said, I do not know what would be a right fee. I do not know anything about the case or how much work would be required or the value of the property involved, and said to Springer, you know more about that than I do. Whatever you think is right will be satisfactory to me. Thereupon Springer asked Jones if
42 five hundred dollars would be about right, and Jones replied, if you think that's fair, it will be satisfactory to me; that Jones did not know at that time that Charles Springer had any interest in the controversy and supposed that Springer was employing him to represent Mr. Dawson, and that Springer was a disinterested friend of both Dawson and himself; that Springer then said, well, we will fix the fee at five hundred dollars for the case in the District Court and in the Supreme Court of the Territory, and Springer thereupon gave Jones a check for one hundred dollars on account of his fee; that nothing was said about the case in the Supreme Court of the United States or about a second trial or about a second appeal to the Supreme Court of the Territory; that afterwards Jones went to the Town of Springer in Colfax county and met the defendant,

Dawson, and talked over the case with him and thereafter Charles Springer and Jones went to the Dawson ranch and looked over the ground and the extent of Dawson's boundaries as it was intended to claim them in the litigation was fixed upon. They are substantially shown by the green line on the map introduced in evidence.

The testimony of the witness, JONES, tended to show that Dawson and Springer were doubtful as to whether or not Dawson should include in his claim the lands contained in Saltpeter canyon, Spring canyon and Lacy canyon, and that it was finally determined to claim them on the advice of the said Jones.

The testimony of the witness, JONES, tended to show that the legal questions involved in the ejectment suit were difficult and novel and that he expended a vast amount of labor in the prepar-tion and trial of the case; that after the first trial, the defendant, Charles Springer, came to him and said: Of course, you can not be expected to attend to this business for any five hundred dollars. You go ahead with it; we will see how we will come out and when it is all over you will be paid what is right; that Jones assented to this and went
43 on with the case with that understanding; that Mr. Jones was the only attorney who represented Mr. Dawson and the interest of the defendant in the ejectment suit from its inception to its close with the single exception of the labor performed by Mr. Brown in Washington, for which Mr. Brown charged one hundred dollars, which the witness, Jones, believed was paid by Charles Springer; that it was the understanding of the witness, Jones, from the time of the conversation with Charles Springer last above referred to that he was working for a contingent fee in the case and that the amount of his compensation would depend upon his success, and that in case he lost the suit, he would get nothing for his services; that at the time of this conversation, Charles Springer gave him a check for two hundred dollars and that the time he went to Washington to file the petition for rehearing Charles Springer gave him two hundred dollars, and that these sums, the one hundred dollars at the time he was first employed, the two hundred dollars after the first trial and the two hundred dollars when he went to Washington to file the petition for rehearing, making a total of five hundred dollars, was all that he had ever received on account of his services and expenses in the said ejectment suit; that he knew the value of his services in said suit and that they were reasonably worth the sum of seventy-five thousand dollars; that he knew the value of the land in controversy in the ejectment suit and that it was reasonably worth the sum of four hundred and fifty thousand dollars; that he did not know until during the first trial of the case that the land was valuable for coal, but he learned during the first trial that the land was practically all underlaid with coal; that there was about twenty-three thousand acres of it and that the defendant, Charles Springer, told him during the first trial that at a cent a ton, the coal in the land was worth a million dollars; and he learned while the first trial was going on that the defendant, Charles
44 Springer, had some interest in the property, but he did not know the extent of that interest until the deed from Dawson

and his wife to Springer was put on record. That deed was recorded October thirtieth, 1896; that Jones would never have made the original agreement for the five hundred dollar fee and would never have allowed the defendant, Charles Springer, to fix the amount of his compensation if he had known of the existence of the contract between Springer and Dawson, which was offered in evidence in the case.

The testimony of the witness, JONES, tended to show that he had several conversations with the defendant, Springer, touching his compensation for services in the ejectment suit and that some time in the summer of 1898, while Jones and Springer were going to Elizabethtown, overland, Jones asked Springer if they could not come to some kind of a settlement about his compensation and said to Springer: Of course, I will have to look to the property for my compensation, to which Springer assented, and Springer said that he had paid out in expenses in the way of costs of witnesses, printing, etc., about two thousand dollars, and Jones said he thought his services in the case ought to bring him as much of a return as Springer's expenditure of two thousand dollars; and that Springer had a deed for one half of the entire property, including Dawson's home ranch, and Springer said that while his deed called for one half interest in the entire property, he did not expect to retain more than one-half interest in the coal land, that was the land outside of Mr. Dawson's home place. The home place consisted of twelve hundred and sixty acres. The extent of Springer's interest and what he had done to acquire it was discussed; and Jones said we have to work this thing along together and I am perfectly willing to take pot luck with you, and we are partners in other matters, if you will deed me one-half of what you are getting out of this, I will be satisfied with it. Springer declined to do this and said he wanted the right to control the property and make a sale of it and did not want it incumbered and that he thought Jones ought to wait until the property was sold and then get a big cash fee out of the proceeds. Jones explained that he wanted to get the matter fixed up and asked Springer to execute a trust agreement, showing his interest. Springer declined to do that; said he did not want to incumber the property and told Jones to wait until the property was sold.

Again in the fall of 1898, at Springer's office in Raton, Jones brought the matter of his compensation up and asked if they could not have a settlement, and Springer again said that he thought Jones ought to wait until the property was sold and get a big cash fee out of the proceeds.

The testimony of Witness JONES, on cross-examination tended to show that subsequent to his employment by Springer in this ejectment suit, he was employed by him in other litigation for various persons out of which he received fees amounting to about nine thousand dollars; that prior to his admission to the bar, he had attended law school for a year and had taught school about two and a half years, during which time he was reading law at nights, Saturdays and Sundays; that on the first of January, 1888, he went into

the law office of Breeden and Vincent, studying law there and doing some practical work from that time until the fourteenth day of May, 1888, when he was admitted to the bar; that Springer did not tell him that he had an interest in the property at the time of his employment nor did he tell him that he did not want the fact to be known because his brother was a director in the Maxwell Company, or an officer in it. He did say that he was going to help Dawson in the preparation of the case for trial in getting at the evidence, and that he did not want it known that he was doing so because of his brother's connection with the Maxwell Company; that
46 Jones was not admitted to the bar of the Supreme Court of the United States until the month of January, 1894, when he went on to arrange for the submission on briefs of the ejectment suit, and at the time that Charles Springer spoke to him about the Dawson case he told him that the Maxwell Land Grant Company had never lost a suit and he thought there was a chance to win this one and also thought it would be a great advantage to Jones to win a suit against the Maxwell Land Grant Company, but he said nothing about how hard the case would be fought and nothing about the appeal, except merely mentioned the fact that his fee would be for the Supreme Court of the Territory; that he did not at that time tell Jones that he had other matters of litigation which would be placed in his hands from which he would gain other fees and compensation; that Charles Springer did place in his hands other legal business from which he received fair compensation but no more than the work was reasonably worth; that when he went to the Dawson place, he went there to get a general idea of the locality, the topography of the country and get an idea of how the two points called for in Dawson's deed were located and see how the canyons came into the Vermejo; that he saw no coal croppings during his visit but does remember that on that trip, while they were examining the property, Charles Springer told him that there were indications of coal on the land; that the first time the witness, Jones, ever knew that Charles Springer had any interest in this property was during the first trial of the Dawson case when the question came up about the expenses of the suit, and Jones learned from Springer that he was paying the expenses of the witnesses and that he had an interest in the property or was going to have such interest, but what the interest of Springer was, Jones did not learn, but he also learned about the same time from the testimony of a Mr. Preston, engineer of the Maxwell Land Grant Company, that the land was
47 valuable for coal and that the company was defending the case upon the theory that it was coal land; that when he learned of Springer's interest he made no objection to Springer having fixed his fee at five hundred dollars, upon the ground that Springer was interested at the time his fee was fixed and he did not know it; that Charles Springer assisted in working up the evidence in the case and rendered all the assistance that he could have rendered in that manner more than the defendant, Dawson, or any other person; that Charles Springer did not do any of the work of a lawyer in the case, he, Jones, prepared the law of the case and

sometimes talked with Springer about it, but Charles Springer in no sense did any of the law work and never attempted to decide any question of law arising in the case; that Jones was the only lawyer in the case.

Upon redirect examination, the testimony of witness, JONES, tended to show that the fees he received from other litigations placed in his hands by Charles Springer were largely paid by others; that a fee of five thousand dollars, received by Jones was as Jones understood it, paid three-fourth- by other persons and one-fourth by Charles Springer; that the other fees were paid wholly by other persons and not by Springer; that it was within a day or two after the witness, Jones, discovered from the testimony in the trial that the land in question was valuable for coal; that the defendant, Charles Springer, came to him and said that he would not be expected to attend to the case for any five hundred dollars, that he should go ahead with it and see how they came out and that when it was all over he would receive what was right.

ALBERT B. FALL was sworn as witness on behalf of the plaintiffs and his testimony tended to show that he is an attorney at law and had been engaged for thirteen years in the practice of law in the Territory of New Mexico and was for two years an Associate
48 Justice of the Supreme Court of New Mexico; that as a member of that court he participated in the decision of the Maxwell Land Grant Company against John B. Dawson and that from his knowledge of the case and of the services of Mr. Jones performed therein he knew the value of said services and that a reasonable value of the services of Mr. Jones in the said ejectment suit would be one-half of what Mr. Springer received for the land, and assuming that the value of the land was four hundred and fifty thousand dollars and that Mr. Springer received one-half of it, Mr. Jones' services were reasonably worth the sum of one hundred and twenty-five thousand dollars unless there was some special service performed by Mr. Springer in making the sale; that if Mr. Springer received two hundred thousand dollars as his share of the proceeds of that land after paying all expenses that then the services of Mr. Jones were reasonably worth the sum of one hundred thousand dollars, and that the reasonable value of Mr. Jones' services would be one-half of what Mr. Springer received after deducting the value of Mr. Springer's special service, if any, in connection with the sale; that the witness knew the value of coal lands in the Territory of New Mexico and the minimum value of such lands as those that were in controversy in the ejectment suit was twenty dollars per acre.

On cross-examination the testimony of the witness tended to show that the value of coal lands depend- to some extent upon the thickness of the vein and the location with reference to railroads, etc., but twenty dollars per acre was the minimum value of coal lands in New Mexico having workable veins of coal; that the proximity of a railroad might enhance the value to a purchaser because it would make them more available but the value of the coal lands would in any event be at least twenty dollars per acre. At the conclusion of the

testimony — the witness, Fall, the defendants, by their
49 counsel, moved the court to strike out all the testimony of the witness Fall as impertinent, irrelevant, immaterial and incompetent because no proper foundation was laid to elicit it and the motion was made to apply to each one of the matters about which the witness testified; the testimony of the witness as to the value of the services of Mr. Jones as well as his testimony in regard to coal lands, that the court overruled said motion to which the defendants by their counsel then and there excepted; and thereupon JAS. G. FITCH, a witness on behalf of the plaintiffs, was sworn and examined and his testimony tended to show that he is a member of the bar of the District and Supreme Courts of the Territory of New Mexico and has been a practicing lawyer in New Mexico for more than fifteen years; that he heard the testimony of A. A. Jones about the services performed by him in the case of the Maxwell Land Grant Company against John B. Dawson; that he had examined the records, briefs and opinions in that case, and from such examination, on some assumption as to the value of the property involved he was able to express an opinion as to the reasonable value of the services of Mr. Jones and assuming that the property involved was approximately worth four hundred and fifty thousand dollars, the value of the services of Mr. Jones was from seventy-five to one hundred and ten thousand dollars, or from one-fourth to one-sixth of the actual value of the property involved, and in view of the extraordinary hard fight in this particular case the witness thought the services of Mr. Jones ought probably to be worth more than that amount.

GEORGE T. PERT, a witness on behalf of the plaintiff, was sworn and examined and his testimony tended to show that he is the superintendent of the Dawson Fuel Company and he visited recently the
50 land purchased from Dawson and Springer in Colfax County, New Mexico; that he first saw these lands on the second or third day of January, 1901, and at that time there was no improvement on the lands and they were like the ordinary unimproved coal lands of the United States; that there was one small opening in one of the canyons known, the witness thought, as Rail canyon, but he did not know the dimensions of it, that the vein including slate and bone in that opening was about nine feet thick.

On cross-examination, the testimony of the witness tended to show that the Dawson Fuel Company had some prospecting done on this land prior to the time when the witness first went there to work, which was on the twenty-second day of July, 1901. There had been some diamond drill work done to find the thickness of the coal; and as to the continuity of the vein but the extent of it was unknown to the witness, who has only seen one place and one hole.

JOHN B. DAWSON, witness on behalf of the plaintiffs, was sworn and examined and his testimony tended to show that the land which was in controversy in the ejectment suit was sold by the witness and Charles Springer to the Dawson Fuel Company for twenty dollars per acre or something more than four hundred and fifty thousand

dollars. The witness identified the deed, and the same, omitting the description which is the description of the land in controversy in the ejectment suit, is as follows:

This Indenture, Made and entered into this third day of October, A. D. 1901, by and between John B. Dawson and Lavina J. Dawson, his wife, and Charles Springer and Mary Chase Springer, his wife, of Colfax County, New Mexico, of the first parties, and the Dawson Fuel Company, a corporation organized and existing under the laws of the Territory of New Mexico, the second party.

Witnesseth: For and in consideration of the sum of five
51 hundred dollars, to them in hand paid by the second party, the receipt whereof is hereby acknowledged, and other good and valuable considerations, the first parties have granted, bargained, sold, conveyed and confirmed, and by these presents do grant, bargain, sell, convey and confirm unto the said second party, its successors and assigns forever, the following described real estate, lying and being situate in the County of Colfax, Territory of New Mexico: All of the real estate within the following named boundaries, to wit:

Description omitted.

Said tract of real estate, after deducting said 1260 acres so excepted therefrom, containing 22,590, more or less.

Together with the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining.

To Have and to Hold, the real estate above conveyed, with the appurtenances, unto the second party, its successors and assigns, forever: And the first parties for themselves, their heirs and assigns, covenant and agree to and with the second party, its successors and assigns, that they are lawfully seized of the above described and granted real estate in fee simple title thereto, and have good and lawful authority to convey the same in the manner above described; that the same and every part thereof is free from all former or other grants, conveyances, liens or incumbrances of any kind or description, and that they will forever warrant and defend the second party, its successors and assigns, in the lawful and peaceful possession of the same and every portion thereof, as against all persons lawfully claiming or to claim the same or any part thereof.

In Witness Whereof, the first parties have hereunto set
52 their hands and seals on the day and year above written.

JOHN B. DAWSON. [SEAL.]
LAVINA J. DAWSON. [SEAL.]
CHARLES SPRINGER. [SEAL.]
MARY CHASE SPRINGER. [SEAL.]

STATE OF TEXAS, *County of El Paso:*

On this third day of October, 1901, before me personally appeared John B. Dawson and Lavina Dawson, his wife, and Charles Springer, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal on this day and year in this certificate written.

B. M. SCANLON,

[N. P. SEAL.] *Notary Public, El Paso County, Texas.*

TERRITORY OF NEW MEXICO, *County of Colfax:*

On this fifth day of October, A. D. 1901, before me personally came Mary Chase Springer, wife of Charles Springer, one of the parties to the foregoing instrument, hearself being known to me as one of the persons described in — and who executed the same as her free act and deed.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate written.

HERMAN GOODMAN,

[N. P. SEAL.] *Notary Public.*

Cancelled revenue stamps attached to deed amounting to $224.75.

(Endorsed) Springer and wife, Dawson and wife, to Dawson Fuel Company, deed.

The tertimony of witness, Dawson, also tended to show that the first payment of twenty thousand dollars made on account of
53 the purchase price of said lands was made December seventeenth, 1900. The second payment of eighty thousand dollars was made May fifteenth, 1901, and other payments were made at various times, dates and amounts not being given, but the total balance of purchase money was paid October third, 1901, when the deed was delivered.

O. A. LARRAZOLO, witness on behalf of the plaintiffs, was sworn and examined and his testimony tended to show that he is a practicing lawyer and has been such for eleven years; that he has practiced in the State of Texas and Territory of New Mexico and has practiced law in Las Vegas, New Mexico, for seven years, that he has examined the record and proceedings in the case of the Maxwell Land Grant Company against John B. Dawson and has heard the testimony of Mr. Jones as to the services rendered in that case; and assuming that the value of the property was approximately worth four hundred and fifty thousand dollars, the witness was able to set the value of such services and in his opinion, fair and just compensation would be not less than one-third and not more than one-half of the value of the property involved as between Mr. Jones and the claimant of the involved property; as between Mr. Jones and Mr. Springer, witness would consider a fair compensation to Mr. Jones would be fifty per cent. of the interest of Mr. Springer in the property after deducting all necessary expenses incurred by Mr. Springer in litigation.

In cross-examination the testimony of the witness tended to show that it was his opinion that a young lawyer without any experience, twenty-nine years of age, who had practiced his profession but three

years, could not charge the same fees as an old, experienced and trained lawyer; and that it was natural for a young lawyer to
54 exaggerate the importance of legal propositions with which he is confronted and is also apt to exaggerate the charcter of the service he has rendered when sucessful; that the witness did not think clients should be required to pay a lawyer for the extra labor caused by his inexperience.

On redirect examination the testimony of the witness tended to show that the more experience a man had with the practice of law the more doubtful he becomes as to all legal propositions and doubt is not usually characteristic of the inexperienced lawyer; it is also true that some men have established a higher reputation at the bar in three years' experience than other men do in thirty years, and the following occurred at the trial:

Q. In expressing your opinion of the value of the services rendered in this case, about which you are asked, were you expressing your opinion as to the value of the services of a young, inexperienced and incompetent lawyer, or were you expressing your opinion as to the value of the services of A. A. Jones?

A. I will answer that by saying that I am far from considering Mr. Jones a young and inexperienced lawyer, I consider Mr. Jones as one of the best——

(Mr. SPIESS:) We object to that.

WITNESS (continuing:) I consider Mr. Jones as one of the best and ablest attorneys of the bar.

(Mr. SPIESS:) We object to that as not responsive to the question asked, and ask that the same be taken from the jury.

(The COURT:) That answer of the witness is taken from the consideration of the jury.

To which action of the court, the plaintiffs then and there excepted and still except.

Mr. FIELD:

Q. I think you have not answered my last question. I will ask the stenographer to read it to you.

55 Stenographer here read the last question of Mr. Field asked of witness, as follows:

In expressing your opinion of the value of the services rendered in this case, about which you are asked, were you expressing your opinion as to the value of the services of a young, inexperienced and incompetent lawyer, or were you expressing your opinion as to the value of the services of A. A. Jones?

A. I expressed my opinion as to the value of the services of A. A. Jones.

(Mr. SPIESS to witness:) What year did you come to Las Vegas?

A. In January, 1895.

Q. When did you first become acquainted with A. A. Jones?

A. Well, sir, very shortly after I came here.

Q. You did not know Mr. Jones in October, 1891, or know any-

thing about his experience as a lawyer or about his skill or his training or the amount of practice he had up to that time, did you?

A. No sir, I don't know anything about that.

Thereupon plaintiffs announced the conclusion of their testimony in chief.

Counsel for defendants thereupon moved the court in writing.

Motion to Withdraw and Strike Out Evidence by Defendants.

Come now the defendants in the above entitled cause, and move the court to withdraw from the jury and strike out so much of the evidence given by A. A. Jones, as a witness as refers:

First: To any statements made to him by the defendant, Springer, about the time of the close of the first trial, or shortly thereafter, in the case of the Maxwell Land Grant Company *vs.* John B. Dawson, to the effect that he, said A. A. Jones, could not be expected to conduct the defense of said cause for the sum of five hundred
56 dollars, and that he should continue the defense and see how the cause came out and that he would be paid what was right therefore.

Second: All the evidence given by the said A. A. Jones in reference to having requested the said Springer to make some settlement with him as to his compensation, and with reference to whether he, Jones, was to be allowed to receive a part of the interest of said Springer in the property in dispute as to that cause; and also the alleged statements as testified to by said Jones of said Springer in response to the requests of the said Jones, to the effect that he, Jones, should wait until the land should be sold and then get "a big cash fee," including all of the evidence in relation to the same and each conversation in reference to the same.

Third: Also, all of the evidence introduced by said plaintiff tending to show the value of the land which was the subject of said litigation, at the time of the sale thereof, or at any other time since the 10th day of August, 1897, the date of the termination of said litigation.

For the Reason, that all of said evidence and each and every part of it is impertinent, improper, incompetent, irrelevant, immaterial, and does not tend to prove or establish any of the issues in this cause; and for the further reason: That as to the third proposition above stated, the said land was not sold as appears by the evidence until after the commencement of this action, and it does not appear that the said land was of the same value at the time of the sale thereof, or at the time of the negotiations of the sale thereof, that is possessed in the market at the close of the said litigation on the 10th day of August, 1897, and no evidence has been introduced tending to show that after the 10th day of August, 1897, the value of said land
57 had remained the same as it was on the date of the close of said litigation, or that its market value had not increased and become much greater.

But the Court overruled the said motion to which the defendants then and there excepted and still except.

JOHN B. DAWSON, one of the defendants, was thereupon sworn as a witness on behalf of the defendants and his testimony tended to show that at the time of the visit of the plaintiff, A. A. Jones, to his place in Colfax County, Mr. Jones was the only person who doubted the propriety of claiming in the ejectment suit, all of the lands, which were afterwards claimed by him and Mr. Chas. Springer insisted that a claim should be made for all of the land and it was so made, notwithstanding Mr. Jones' doubts; that at no time prior to the commencement of this suit did Jones make any demand on the witness or claim payment for any services in the ejectment suit; that in March, 1889, at Raton, in Colfax County, Jones said to witness that he would like himself and Charles Springer together to go and agree what he, Jones, was to get for his services in that case and witness said I do not owe you anything, Mr. Jones, and I don't know that Springer owes you, but Mr. Springer has told me that he employed you for five hundred dollars and that he paid you; that witness further said I don't think you ought to be hard on Springer as the case has been a help to you; conversation ceased and the parties separated and that was the first time that Dawson ever heard that Jones claimed anything; that Mr. Jones said in that conversation that if the witness was not obligated then he ought not to pay anything; that when witness first met Jones and was introduced to him by Springer, witness remarked, and you are
58 the man or the lawyer that Mr. Springer has employed in this case, and nothing was said by witness about Jones being his lawyer.

On cross-examination, the testimony of the witness tended to show that he talked with Mr. Jones as a lawyer that had been employed by Mr. Springer; that he never told Mr. Jones at any time that Springer was bound by contract with the witness to pay Jones for his services; that the witness never said to H. W. Kelly, of Gross, Blackwell & Co., that Jones had an interest in this land; the witness never had any lawyer in the case except Mr. Jones; that is, no lawyer who had been admitted to the bar, but he thought Charlie Springer was a mighty good lawyer and had great confidence in him in that case and consulted him more frequently than he did Mr. Jones; that he many times told Charlie Springer that whatever he did in the case was all right; that Mr. Jones managed his case, the ejectment suit, with magnificent skill.

J. VAN HOUTEN was sworn as a witness on behalf of the defendants and his testimony tended to show that he was acquainted with the value of the land in litigation in the ejectment suit, had been in the employ of the Maxwell Land Grant Company for about fourteen years and had an intimate knowledge of the land in question and its value and that in the opinion of the witness the land in litigation in the ejectment suit was worth not exceeding forty thousand dollars in the year 1897.

On cross-examination the testimony of the witness tended to show that about Christmas of the year 1900, the witness offered to pay one hundred and fifty thousand dollars for this land; that there had been no increase in the coal deposit, no change in the accessibility

of the field and no development between 1897 and 1900, but there had been a change in other conditions, that is to say, there had been a great change in the prospect of accessibility, there
59 was more prospect of railroad building which had a good foundation, and the business of the country had increased to such an extent that the consumption of coal had greatly increased, and there was also a general rumor that the El Paso-Northeastern Railroad was going to extend north and benefit this property; that at the time the witness made the offer of one hundred and fifty thousand dollars for the land, he thought he could afford to offer fifty per cent. more than the property was worth in order to get absolute control of it; that his sole purpose in attempting to purchase the property was preventing it to get into the hands of some person who might open it up in competition with the coal lands of the Maxwell Company; that ten cents per ton is the usual royalty paid on coal mined from lands of other persons, that is the lowest royalty witness ever knew to be paid in New Mexico, but there is no royalty paid unless coal is mined and could probably not be mined unless it was accessible to market.

CHARLES SPRINGER, one of the defendants, was sworn and examined and his testimony tended to show that he had known John B. Dawson nearly twenty-four years; that they had resided in the same County probably fifteen miles from each other, during that time and had been very friendly, hunted together and been together a great deal and had been associated together in business; that he had a contract with Dawson with reference to the land involved in the ejectment suit and that prior to 1891, witness and Dawson had noticed croppings of coal upon the property and some indications of petroleum and it was thought by witness and Dawson that there might be some possibility of developing the property and possibly effecting a sale, and Dawson told witness that if the witness would undertake to do that as well as to defend the title to the
60 property against any litigation which might arise over it, he would give the witness one-half interest in the coal and mineral on the property; and in 1891, contract introduced in evidence, was entered into; that after that contract was made in the fall of 1891, the Maxwell Land Grant Company brought a suit in ejectment against Mr. Dawson involving the title to all that land; that witness consulted many lawyers, including his father, who was a lawyer of extensive experience and had been a long time on the bench of the State of Iowa, and these consultations were with a view of posting himself about the title and to determine whether he should undertake it and what should be done in the case towards a defense; after the suit was brought, witness visited Las Vegas to employ counsel and determined to employ A. A. Jones if he could do so; that he was not personally acquainted with Mr. Jones and was introduced to him on the day when he first spoke to him about the Dawson case and told Mr. Jones something of the case; told him that the Maxwell Land Grant Company had brought a suit in ejectment against Mr. Dawson involving the title to his ranch in Colfax County; that he had an interest in the property and that he had to

pay all the expenses of the litigation; that he had come to see if he could employ him; that Jones asked witness if he had employed or if he expected to employ anybody else; the witness told him he had not and had no intention of doing so; that he told Jones that the case would undoubtedly be bitterly fought by the Maxwell Land Grant Company and that they had, up to that time, never been defeated in a law suit; that the case would undoubtedly go to the Supreme Court of the United States and asked him what he would charge the witness to conduct the litigation; and Jones answered I am willing to leave the matter entirely to you; that witness then said. I would like to have settled what your charges will be and asked Jones to state what his charge would be, to which Jones
61 replied that he did not care to do that; that the witness said how would a fee of five hundred dollars do, to which Jones replied that will be perfectly satisfactory and the witness said that is for the entire litigation; Mr. Jones after some hesitation said yes, I am satisfied with that; that witness told Jones that he had considerable other business, some of his own and some that he controlled, which would require the services of an attorney and that if he undertook the Dawson case, witness would give him such business as he had in that line and get whatever business for him that witness could get on the outside; witness also said that he would himself assist in the case in every way possible and would get up all maps and plats and surveys and generally hunt up all the evidence in the case; that Jones made no inquiry with reference to the authority of witness to employ him in the case and all that was said on that subject was that witness had an interest in the property and had to pay the expenses of the litigation; that witness and Jones visited the Dawson ranch in order that Mr. Jones might familiarize himself with the topography of the country; that they travelled over the land and discussed the Dawson claim; that Jones contended that it was not best to claim all of the land which was finally claimed, but after thorough discussion he acquiesced in the view of the witness that all of the land should be claimed; that witness had told Mr. Jones that there were coal croppings on the property and that witness and Jones passed near one of the most prominent coal croppings where it could plainly be seen from the trail and plainly saw it; that witness afterwards went to Las Vegas and went over very carefully the case; witness wrote out the description to be used in the plea which described the property claimed by Dawson in the litigation and it was put in the plea in the exact language in which witness wrote it; that witness hunted up all the evidence, had maps and plats prepared for use in the trial and did everything
62 possible to get the evidence in shape and gave Mr. Jones written statements of what the witness would swear to; Mr. Jones hunted up no witnesses but talked with all the witnesses before the trial; that witness assisted Mr. Jones during the trial of the case at his request in looking up authorities and at different times Jones gave the witness a memorandum of any he wanted looked up for him, particularly with reference to the instructions to be asked on Dawson's side and asked the witness to write out some instructions which they desired to ask; that the witness never said

to Jones, at the time and place said by Jones, or any other time, that he, Jones, could not be expected to carry on the case for a fee of five hundred dollars or to go on with the case and we will see how we come out and when it is over you shall be paid what is right; that there was not during the trial or at any other time any agreement or proposition to make any change in the compensation or mode of compensation, which Jones was to receive for his service as attorney for the defendant in that case; that there was never any change made in the agreement as to compensation of Mr. Jones in that case prior to the final determination of it, and Mr. Jones never intimated to witness that he was dissatisfied on acount of his compensation; that witness paid to Jones seven hundred dollars and to an attorney in Washington one hundred dollars, and that two hundred of the seven hundred Jones claimed he should have for his expenses to Washington, the other five hundred dollars was paid for his fee in that case under the contract; that witness heard the testimony of Mr. Jones in regard to conversation when they were going to Elizabethtown and what passed was Mr. Jones and witness were in partnership in some mining business at Elizabethtown and Mr. Jones said to witness, Charlie, are we to be partners in the Dawson land also, how much has that cost you, how much are you out, and witness answered, it has cost me considerable money and I do not care to take any partner in on it, and the subject was dropped at
63 that time; that neither at that time or place or at any other time or place did the witness ever say to Jones wait until the property is sold and then receive a big cash fee or anything of the substance or effect; that witness never made such statement to Mr. Jones at his office in Raton or elsewhere; that after Mr. Jones was employed in the Dawson case witness gave him a great deal of business out of which Jones realized in the neighborhood of fifteen thousand dollars; that witness never told Jones that there was sufficient coal on this property to amount to a million dollars at a cent a ton; that Mr. Jones throughout the litigation asked advice of the witness and consulted with him about every important step in the case and usually deferred to the wishes of the witness when there was any doubt and Mr. Jones never made any demand on the witness for additional compensation beyond the amount agreed upon, never made any demand at all prior to the institution of this suit, that witness aided Jones in the preparation of his brief in the Supreme Court of the Territory and the Supreme Court of the United States.

On cross-examination the testimony of the witness tended to show that he is forty-three years old and had lived in Colfax County since 1878 and has lived a great deal of that time near the home ranch of Mr. Dawson; that he has been for practically all of that time familiar with the extent and boundaries of the Dawson ranch within the limits of the Maxwell Land Grant, having first ascertained that there was likely to be litigation between Dawson and the Grant Company soon after he came to New Mexico in 1878, or at least knew that there was some questions as to his boundaries; that he talked the matter over with Mr. Dawson a great many times and was frequently with the officers of the Grant Company and heard more or

less of the controversy from both parties and was first led to investigate it by his particular friendship for Mr. Dawson; in talk-
64 ing it over, Mr. Dawson told the witness that if the witness would take hold of the matter in the way set forth in the contract made later, that Dawson would give the witness one-half interest in the mineral and coal and in 1891 the contract was made. Witness did not pay Mr. Dawson any additional consideration in money for the deed which was made in 1896, but assisted him a great deal in his affairs, financial and otherwise, and Mr. Dawson voluntarily made the deed but witness did not ask him to do so. It was the intention of the deed to cover the same territory covered by the contract for one-half the mineral; witness marked on the map with red lines the land described in the contract which is a body of land from which the water drains into the valley of the Vermejo river between the Dawson dam and Dawson's rock fence and does not embrace any part of the Saltpeter canyon, Spring canyon or Lacy canyon; witness then drew upon the map a green line embracing the land described in the deed from Dawson and wife to him, which land includes a portion of Saltpeter canyon, Spring canyon and Lacy canyon, being the land from which the water drains into the Vermejo between Dawson's dam and Dawson's rock fence, and also the drainage of the canyons known as Saltpeter canyon, Spring canyon and Lacy canyon, which lie above the line of the rock fence; that the land described in the contract without some explanation is confined to Rail canyon and Coal canyon alone.

On redirect examination the witness stated that the description of the land intended to be conveyed by the contract was very imperfect, but it was intended in making the contract to include the land in Saltpeter canyon.

On re-cross-examination the witness stated that the contract accurately described the land which he testified Jones thought ought to be the limit of Dawson's claim and the deed accurately describes the land which was recovered in the action of ejectment; but
65 the deed was made before the land was recovered in the action of ejectment; as a matter of fact that there was no land recovered in the suit of ejectment and the Maxwell Land Grant Company simply failed to maintain its suit.

CHARLES SPRINGER was recalled as a witness on behalf of the defendants and his testimony tended to show that at the time of the visit to Dawson's ranch by Jones and the witness there was a survey in progress and the map offered in evidence is a map of the survey as it was finally made; that survey was in progress at the time when Mr. Jones and witness went to visit the ranch; previously, the witness had instructed the surveyor to make a survey around this entire tract of land and the survey was so made under instructions of witness; the name of the surveyor was Geo. R. Denise, but witness does not know where he is and had made no effort to find him.

AUGUSTUS DAWSON, witness on behalf of the defendants, was sworn and examined and his testimony tended to show that he is a son of John B. Dawson, thirty-nine years of age and is acquainted

with the land which was in controversy in the ejectment suit; that the survey of the land was made by Mr. Denise under the instructions of Charles Springer; the witness assisted in making the survey which was in progress at the time Mr. Jones and Charles Springer came to the ranch; that the instructions to make the survey as it was made before Jones and Springer came to the ranch were given by Charles Springer; that witness practically knows every foot of the country, having obtained his knowledge by working after stock, hunting after game and making his home there, having lived there most all of his life; witness always knew there was coal on the land but did not know much about it, it only showed that there
66 was coal in several places; witness went with Jones and Springer the afternoon of the day they were at the ranch to the top of the divide between Spring canyon and Rail canyon; that in going, they passed a coal cropping about thirty feet long and about eight or ten feet of a face to it, a sloping face not more than one hundred feet from the trail; prior to 1897, before August, 1897, nothing had been done to develop coal on the tract except a small opening made by witness's father to get coal for domestic purposes; there was a tunnel of fifty or sixty feet in the mountain up to 1897 and about a five or six foot vein of coal; after August 10, 1897, and prior to October 3, 1901, there had been considerable prospecting in the way of tracing up the croppings, four diamond drill holes put down and there had been several openings, three main openings by the Dawson Fuel Company, a tram road built and the foundation for a tipple; witness described at length the work done since October 3, 1901, in the veins of coal as he understood them; but witness does not think there has been enough work done to determine the question as to whether the whole tract is underlaid with coal; that on this occasion there was a long discussion between Jones and Springer about what could be proven in the ejectment case and whether it would be advisable to throw out Saltpeter canyon and the other canyons or keep them in; Springer was inclined to hold Saltpeter canyon in the claim and Jones seemed to be doubtful about it; the result was that Springer insisted on keeping Saltpeter canyon, Spring canyon and Lacy canyon in the claim and Jones seemed to be doubtful about it; it was finally determined after they returned to the house that the three canyons should be included in the claim.

JOHN D. VEEDER, witness on behalf of the defendants, was sworn and examined and his testimony tended to show that he is an attorney at law, forty-six years of age and resides in Las Vegas,
67 where he commenced the practice of law in 1882, that from that time on he has resided in Las Vegas and practiced law throughout the Territory in the District Courts of the Territory, in the Supreme Court of the Territory and in the court of private land claims in the Territory and Texas and in the United States Supreme Court; that he is acquainted with the decision of the Supreme Court of the Territory and the Supreme Court of the United States in the case of the Maxwell Land Grant Company *vs.* John B. Dawson; that he had been present during the trial of this case and heard the testimony of the plaintiff, A. A. Jones, and has examined the record

which was used in the Supreme Court of the Territory and also the record which was used in the Supreme Court of the United States, and copies of briefs used by both sides in those courts and from his knowledge of that case derived from sources mentioned, witness can give an opinion as to the value of the services of A. A. Jones therein, supposing that there was no counsel in existence, fixing the value of such services; assuming the area in dispute to be about twenty-three thousand acres, a fair and reasonable fee for the services of Mr. Jones in the ejectment suit would be the sum of not more than five thousand dollars which should include all traveling expenses in connection with the case.

On cross-examination the testimony of the witness tended to show that he had assumed what he described as a middle ground on the value of the property in controversy in the ejectment suit, but he did not disclose to the jury and was not asked to disclose to the jury what he meant by taking a middle ground on the value of the property in controversy nor what value he assumed for the property in making his estimate as to the value of Mr. Jones' services.

The plaintiffs, by counsel, moved the court to strike out so much of the testimony of the witness, John D. Veeder, as expressed
68 his opinion as to the value of the legal services of the plaintiff, A. A. Jones, in the case of the Maxwell Land Grant Company *vs.* John B. Dawson, because it affirmatively appears from the testimony of the witness that his opinion as to the value of the services of A. A. Jones is based upon an assumption as to the value of the land in controversy in that suit, which assumption of value is not disclosed to the jury and is not based upon the evidence in the case; but the court overruled the said motion to which the plaintiffs then and there excepted and still except.

R. E. TWITCHELL, a witness on behalf of the defendants, was sworn and examined and his testimony tended to show that he lives in Las Vegas, New Mexico, and has practiced law for twenty-one years; that he is acquainted with the decisions of the Supreme Court of the Territory and the Supreme Court of the United States in the case of the Maxwell Land Grant Company *vs.* John B. Dawson; that he has examined the records and proceedings in the case; that he can express an opinion as to the value of the services of A. A. Jones in that case on the assumption that there was no contract fixing the value of his services; that in the opinion of the witness from two thousand-five hundred to three thousand five-hundred dollars would be a fair and reasonable compensation for the services of A. A. Jones in that case; that the witness is familiar with coal lands in the Territory of New Mexico and can state the elements which go into the determination of the value of coal fields in New Mexico; such elements are first the area of the coal; the quantity of the coal; the thickness of the vein; the market for the product; the adjacency of the coal fields to transportation facilities, and the demand for the coal product in the localities reached by the transportation companies handling coal, and whether or not that market and field is
69 controlled by another competing coal company or another transportation company; that there is a difference between

the value of the Dawson coal lands in August 10, 1897, and August 10, 1901.

Upon cross-examination of the witness, the following occurred:

Q. I don't care to be exact—In estimating the value of Mr. Jones' services in this particular case, have you made any mental assumption as to the value of the land which was in controversy in that case?

A. I have taken into consideration what I considered to be the value of that property at the time that this litigation was instituted and at the time it was closed.

Q. And that assumption was one of your own,—you assumed that you knew what that value was?

A. Hardly an assumption. It was based upon what I considered to be the fair market value of that class of property.

Q. Are you prepared to say that that property ever had a market value?

A. Yes sir, I think all property has a market value.

Q. What do you understand by the expression market value?

A. My understanding of fair market value of property is what it will bring at forced sale after fair and reasonable publication in the centers where money can be had to purchase.

Q. And your estimate of the value of Mr. Jones' services is based upon your opinion as to what this property would have brought at forced sale in centers where money could have been had to purchase it?

A. No sir, it is based upon the services rendered by Mr. Jones, in the prosecution of this suit.

Q. Regardless of the question of the value of the property in controversy?

A. I think a man necessarily had to take into consideration the value of the property.

Q. Now again assume the value of this property at all
70 times from the beginning to the end of this litigation was not less than $450,000, would your opinion as to the value of Mr. Jones' services be changed?

A. I could not indulge in that assumption with reference to that property in figuring out and giving an honest opinion of what I consider to be the value of Mr. Jones' services.

Q. You utterly decline to express an opinion as to the value of Mr. Jones' services based upon that assumption, do you?

A. I say my judgment of the value of Mr. Jones' services is based upon, what is apparent in the transcript of the record, under the assumptions and provisos given, would be from $2,500 to $3,500.

Q. Do you understand that to be an answer to my question?

A. Yes sir.

Q. I will ask the stenographer to read it to you——

You utterly decline to express an opinion as to the value of Mr. Jones' service based upon that assumption do you?

(Mr. FIELD:) That is the assumption that the property was worth at all times $450,000.

A. I do not decline to give any answer.

Q. Well, now, assume the value of the property at all times, while the litigation was pending was approximately $450,000, what in your opinion was the value of Mr. Jones' services?

A. In a case of that kind it depends a great deal upon who the lawyer is, and always such things are matters of contract, and it is difficult for a person to give any estimate as to what the value of services in that sort of a case would be. I want to say that I have known of cases——

Q. I have not asked you that.

A. I have got a perfect right in answering a hypothetical question to say the reason I answer it as I do.

Q. (Mr. FIELD:) I will ask your Honor to instruct the
71 witness to answer this question.

(The COURT:) I think he was about to answer it.

A. I have known cases where the amount involved was considerable over a half a million dollars. I have known at least one case where the fee was charged less than the amount I have testified to as being a fair and reasonable compensation to Mr. Jones, and I have known of other cases where the amount was much less than the amount which you put to me, where the fee was paid and contracted for was much larger.

Q. Now you feel yourself utterly unable to express an intelligent opinion of the value of Mr. Jones' services based on the assumption that this property was at all times worth $450,000 do you?

A. No sir, I don't feel utterly unable to.

Q. Why don't you do it?

A. Well, I should say they were worth from $2,500 to $3,500, taking into consideration everything else that has been put to me in connection with this case.

Q. Then when you make your mental assumption of the value of this property, you do not put it as high as $450,000 do you, in your own mind?

A. No sir, because that property,—its value, is purely speculative.

Q. Then in effect it is your judgment that the amount in controversy in that case is not an element in determining the value of Mr. Jones' services.

A. I think that possibly the value of the property at the time that Mr. Jones was engaged as an attorney in the case would have something to do in influencing the person employing him in paying him.

Q. Don't you understand your entire testimony has been based upon the assumption that there was no contract as to the value of these services.

A. My entire testimony has been given on the assumptions provided in the questions made to me by Mr. Spiess.

72 Q. You say that you have known of similar cases to this, —will you tell us some of them?

A. Yes sir, I can, but I don't know as I ought to tell.

Q. Why not,—would it be a breach of professional confidence.— I don't ask you to do that.

A. No sir, there is no breach of professional confidence. In the

case in which the Cerrillos Coal Railroad Company was defendant, in an ejectment suit brought by one Solomon Luna, and involving about twenty-three thousand acres of land, coal land, similar to this, Mr. H. L. Waldo, and myself, under our contract, had to look after the defendant's interest in that case. It was considered for the best interests of the defendant to employ counsel along with Judge Waldo and myself and counsel was employed. The gentleman who was employed took entire charge of the securing of testimony; of the presentation of the case to the court, and the questions involved were certainly as intricate as any involved in this case of the Maxwell Land Grant Company *vs.* Dawson, and for the services of this gentleman in the District Court, in the Supreme Court of New Mexico, and in the Supreme Court of the United States, and in another case involving the same questions prosecuted to the Supreme Court of the United States, we paid the gentleman $2,500.

Q. Who was the gentleman?

A. T. B. Catron.

Q. T. B. Catron had conveyed that property to the Cerrillos Railroad Company, hadn't he?

A. He had not.

Q. You mean to say he had never been connected with that title and had not sold it?

A. I said that Catron had never conveyed that property to the Cerrillos Coal Railroad Company.

Q. Didn't he convey it to somebody else who did?

A. I believe he did—No, no, he did not. He conveyed it to another company and that company leased it to the Cer-
73 rillos Coal Railroad.

Q. This suit was an attack upon the title which had been conveyed by T. B. Catron, was it not?

A. It was an attack upon the title of the Cerrillos Coal and Iron Company to a portion of the Mesita de Juana Grant, and a portion of the Ortiz Mining Grant. Mr. Catron was one of a great number of grantors to the Cerrillos Coal and Iron Company to the title to that property. I will state also that although that case has not yet been determined, one of the principal questions arising in the defense of the title was adverse possession.

Q. Under deeds?

A. Part of it under deeds and part of it not.

Q. The suit by Solomon Luna involved what portion of the title to the Mesita de Juna Lopez Grant.

A. One-sixth of the property.

—. Then there are 138,000 acres of coal land in the Mesita Juana Lopez Grant, are there?

A. No sir, there are not.

Q. Well, did the suit involve the title to 23,000 acres of coal land, or one-sixth of 23,000 acres of coal land?

A. It involved the title to one-sixth of all that portion of the Mesita de Juana Lopez Grant lying west of the Galisteo river and upon which and within the limits of which there are about 23,000 acres of coal.

Q. You understand it is a part of the duty of a lawyer to go out

into the country and hunt up witnesses when he is employed in a case, Mr. Twitchell?

A. I have known of a great many distinguished lawyers in the Territory of New Mexico doing it.

Q. Will you answer my question?

A. I consider it a part of a lawyer's duty to take care of the interest of his client, and if in caring for the interest of his client it is necessary for him to get witnesses to prove any necessary fact, then that is a part of his duty. Yes sir.

74 Q. Then do you understand it is a part of the duty of a lawyer to go out and hunt up witnesses by whom to establish his clients' defense.

(Mr. SPIESS:) He has just answered that.

(The COURT:) I think he has answered it.

Q. Did you ever know of an acre of coal land in the Territory of New Mexico, within fifteen miles of a railroad, being sold for less than $20 per acre?

A. Not a single acre, no sir.

Q. Or other body?

A. Yes sir.

Q. Where and when and by whom?

A. A number of sales of that kind close to Cerillos.

Q. Tell us some of the people who made them.

A. I don't remember the exact names of the people who made them; but I have known of several sales down there where the amount involved was less than $20 per acre.

Q. Are you talking about a matter of which you have a personal knowledge?

A. Personal knowledge gathered from records of the probate court and the recorder's offices and talking with the people who made the sales. I never sold any myself.

Q. And you never saw any sold did you?

A. Well, I have known of it being sold, as I say.

Q. That is you know of people who told you they had known of it being sold?

A. No, I have talked with the people who owned the land.

Q. Will you tell us who they are?

A. I am not certain but I think that about seven or eight miles from Ortiz, a station on the Santa Fe Railroad, four or five openings there have been sold at various times by various parties for various sums, and all of them within $20 per acre.

Q. Was this land on the public domain?

A. Part of it and part of it on grant land, I think also that
75 one property down there was sold under the order of the court or some master's sale, or sheriff's sale, and I think that brought less than $20 per acre.

Q. You say "You think?"

A. Yes, I say that because I don't know exactly the amount of any particular property.

Q. And you don't know whether it was offered under $20 an acre then?

A. Yes, I know it was under $20 an acre, but I don't know how much under.

Q. Do you know the character of title that was sold?

A. I never investigated that.

Q. Don't know whether it was a mere relinquishment of the government right to enter, do you?

A. I never looked it up.

Q. You don't know whether it was a disputed title or title that was beyond question, do you?

A. I do not. All I know is it was sold for less than $20 per acre.

Q. And you know that because somebody told you so?

A. I know that because the records in the Probate Clerk's office and from the parties making the sale.

Re-direct examination by C. A. SPIESS:

Q. Do you know Pedro Delgado?

A. Yes sir.

Q. I will ask you to state whether or not you know he sold his interest in this very tract of land of the Cerrillos Coal Railway Company land for an amount of money which was less than $20 per acre.

A. No sir, Pedro Delgado did not. Francisco Delgado and Juan Delgado sold their interest in the Mesita de Juana Lopez Grant for very much less than $20.

Q. I will ask you to state if in your opinion it is very difficult to maintain a title which has accrued to a person by reason of adverse possession if the facts establish adverse possession to 23,000 acres of land, if the tract contains 23,000 acres of land, or whether it contains one acre of land.

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A. You want my opinion. I don't think it makes any difference as to area. Oftentimes there is more difficulty in trying a little case of forcible entry and detainer than there is in an action of ejectment covering a large area.

Q. If the evidencary facts existing prove adverse possession to 23,000 acres of land, there is no more difficulty to prove it than it is to prove one acre, is that your opinion?

A. Yes sir.

Q. Do you know what kind of a deed T. B. Catron gave when he conveyed title to the Cerrillos Coal and Iron Company, that is as to whether it was a quit claim or a warranty deed.

A. Mr. and Mrs. Catron executed two or three deeds. I have a copy of the deed in my office. My recollection is it was a quit claim deed. I am not certain about it though.

Q. Are you familiar with the Mesita Juana Lopez Grant?

A. Yes sir, I have been all over it.

Q. Were you familiar with it at the time that your company employed the services of T. B. Catron for $2,500, for the purpose of defending the title to that grant against the suit commenced by Solomon Luna?

A. I was familiar with the property at that time the Cerrillos Coal Railway Company employed Catron.

Q. What was the condition of that property as to being improved or unimproved?

A. That portion of the property lying west of the Galisteo river was highly improved. Upwards of $250,000 to $350,000 had been spent on the property.

77 Q. Can you state what the value at that time was of those 23,000 acres of land?

A. I believe I can give a fair estimate of the value of what is known as the Cerrillos coal field, with its improvements.

Q. You may state that value.

A. Five hundred thousand dollars. That is a very reasonable and conservative estimate.

Q. I will ask you whether or not there was a railroad built on that property and a market for the coal at that time.

A. Yes sir. The surface improvements at Madrid, including the hard coal breaker, and the various houses owned by the company at the time, the machinery, and all in connection with it, if put up at forced sale, after due notice, would bring a half a million dollars.

Q. I will ask you to refresh your memory, and state whether or not the amount, or the interest that Catron was employed to represent in those two suits, was not a two-fifth interest of said one-sixth interest.

A. I was only interrogated with reference to the interest of Solmon Luna, which, to my recollection, was one-sixth. The interest represented by Governor Prince, other heirs than Solomon Luna, was about two-fifths of the property.

Q. Now were they both involved in that litigation?

A. Yes sir.

Q. The same questions which would come up in the case represented by Governor Prince were practically presented in the case of Solomon Luna.

A. Yes sir.

Q. And was that fee of $2,500 which Mr. Catron was to be paid for defending those suits, did that apply to both of those suits?

A. Yes sir, and until the litigation was concluded.

78 Recross-examination by N. B. FIELD:

Q. Was this coal property at Cerrillos recently bought in at forced sale, and sold by due notice by a master of the court?

A. Yes sir.

Q. How much did it bring?

A. About $474,000 I think.

Q. Do you know?

A. I was not there when it was bid in.

Q. Who bid it in?

A. The Chicago and Pittsburg Coal and Mining Company.

Q. How much was bid for it?

A. I have forgotten the exact amount that was paid. My recollection is it was bid in for bonds.

Q. Aren't you mistaken about that and was it not bid in for much less than the bonds.

A. No sir, I don't think so. I might be mistaken.

Q. This interest of Delgado's which was sold in that property was an undivided interest and at the time of the sale, the property was in the adverse possession of the Cerrillos Coal Railroad Company or of some other similar corporation who disputed Delgado's right to anything, was it not?

A. Yes sir.

Q. Do you think that sale gives any fair estimate of the value of the property sold, a fair basis for an estimate of the value of the property sold.

A. Under the conditions, yes sir.

Q. At the time of this sale by the Cerrillos Coal Railroad Company or the sale under the foreclosure, have you any idea how much coal had been theretofore taken out of that ground?

A. Yes sir, I could figure it up.

Q. Approximately—I do not care about great accuracy.

79 A. I will say from 400 to 500 tons a day since 1893 or 1894.

Q. Could you give us an estimate of the total value of that coal?

A. My understanding is that it was all mined at a loss.

Q. I am talking about the coal that was taken out and the value of it as it came out.

A. No sir, I could not give anything like a reasonable approximation of that.

Q. Do you know whether or not there is a fixed royalty on coal in places throughout the Territory of New Mexico?

(Objected to by defendant's counsel as not proper cross-examination.)

Objection overruled; exception reserved.

A. I don't know of my own knowledge, but I understand that there is. I have known of royalties being paid for coal in place.

Q. What is that royalty?——

(Objected to as not proper cross-examination. Objection overruled. Exception by defendants' counsel.)

A. Ten cents per ton.

(Mr. Spiess:)

Q. Do you know of any royalty being paid on coal or coal lands that is not connected with a railroad or market, and when you state that you know that there is a royalty of ten cents per ton, I will ask you if that is not for coal or coal lands connected with a railroad?

A. That is with reference to coal adjacent to railroad transportation.

Q. That is railroad transportation for it to market?

A. Yes sir.

(Mr. Field:)

Q. Don't you know the operators have their own connection to the railroad and pay that royalty?

A. In all the railroads that I know of that build to coal
80 fields they are railroads as I understand it belonging to transportation companies.

Q. Do you know who built the road to the mines in Gallup, Bernalillo County?

A. I think there is a spur out to the mines that does not belong to the Santa Fe Pacific, yes sir.

Q. You also know the Railroad Company charges the owner of that spur ten cents per ton for all the coal mined in its Territory?

A. No sir.

Q. Do you know anything about it?

A. No sir.

(Mr. SPIESS:)

Q. Did you ever hear of a railroad company building a distance of fifteen miles and a royalty of ten cents per ton paid for coal?

A. I never did.

The defendants moved the court to strike out so much of the testimony of the witness, R. E. Twitchell, as related to his opinion of the value of Mr. Jones' services in the case of the Maxwell Land Grant Company *vs.* Dawson because it appears from the testimony of the witness that his estimate of such value is based on an assumption by him as to the value of the land in controversy in that suit, which assumption is not based upon the evidence in the case nor is it disclosed to the jury. But the court overruled the said motion to which the plaintiffs by counsel then and there excepted and still except. Plaintiffs thereupon moved the court to strike out so much of the testimony of the witness R. E. Twitchell, as relates to his opinion as to the value of coal lands in New Mexico because it appears affirmatively from the testimony of the witness that in his opinion the value of coal lands in New Mexico depend upon the price which they would bring at forced sale, and does not depend upon the rules well established by law as to what constitutes value; but the court overruled the said motion to which the plaintiffs by counsel then and there excepted and still except.

81 JEREMIAH LEAHY, a witness on behalf of the defendants, was sworn and examined and his testimony tended to show that he is a practicing lawyer, residing at Raton, in Colfax County, New Mexico; is a member of the bar of the Supreme Court of the Territory, and has been District Attorney for Colfax and Union Counties since 1898; that he has examined the records, briefs and opinions of the court in the ejectment suit and assuming in addition to the matters shown by the decisions, the record and proceedings, that the case was tried a second time in the District Court, resulting in a verdict and judgment for the defendants, and that an appeal to the Supreme Court from that judgment was dismissed on motion of plaintiff's counsel he could give from his knowledge of the case an opinion as to the value of the services of A. A. Jones in that case, assuming that Mr. Jones acted as attorney in the absence of any contract or understanding and that he was not compelled to go after

the witnesses to interrogate and to confine him solely to the legal work, a reasonable fee for those services would be from two to four thousand dollars and this fee would include the services rendered in examination of the witnesses presented to him for the trial of the case, but not assuming that Mr. Jones had to go out from his office and place of business to hunt up and interrogate witnesses.

Upon cross-examination the witness was interrogated as follows:

Q. In estimating the value of Mr. Jones' services in that case, have you made any mental assumption as to the value of the property involved?
A. I have—in this way.
Q. I do not ask you what it is. I ask if you have.
A. Yes sir.
Q. And your estimate of the value of Mr. Jones' services is based on the valuation of that property which you have fixed in your own mind?
82 A. Yes sir, from——
Q. Never mind from what. It is based upon the valuation which you fixed on the property in your own mind?
A. No sir, not entirely so.
Q. Is it based upon the valuation of the property?
A. From the information I had had about the property.
Q. Is it in your mind?
A. Yes, from knowledge and information I had of the property at the time.
Q. Now the valuation of this property cuts a large figure in the value of the services rendered does it not?
A. I would not say that it cut a large figure. I say it cuts some figure.
Q. Would you say it was a small circumstance?
A. No sir, I would not.
Q. Did you ever know or hear of or read of a reported case in any book in which title to a tract of 23,000 acres of land was maintained upon a plea of the statute of limitations by the defense of adverse possession?
A. No sir.

The witness Leahy was further examined in chief by the counsel for the defendants as to his knowledge of the value of coal lands and testified as follows:

(Mr. SPIESS to Leahy:)

Q. Do you know the location of the Dawson coal land in question in that other suit?
A. I do.
Q. How far do you live from that land?
A. It is in the neighborhood of twenty-five miles.
Q. Have you ever been on that land and seen it?
A. I have, several times.
Q. Are you acquainted with the value of coal land such as these lands are, in Colfax County?

A. Not except as the owners of coal lands up there in that
83 neighborhood are offering coal lands for sale, and as some of it is bought, and the price paid for it.

(Mr. FIELD:)

Q. Do you know of the actual purchase and sales of coal lands in the vicinity of these lands?

A. Within a distance of thirty-five miles from there I do.

Q. You know of your own knowledge of that?

A. Yes sir.

(Mr. SPIESS to witness:)

Q. You say you know of lands within a distance of thirty-five miles of the Dawson coal fields being sold?

A. Yes sir.

Q. Were those coal lands?

A. There was coal there. The coal was sold.

Q. I will ask you to state what it sold for.

A. The coal, it is under the land, the coal itself sold for five dollars per acre.

Q. In answer to a question upon cross examination by Mr. Field, you stated that you had assumed the value for the Dawson coal fields, I will ask you to state whether that assumption of yours was based upon knowledge of those fields and the value thereof?

A. Upon the knowledge I have of it, yes sir.

Q. I will ask you to state how far from the railroad the coal which you state was sold for $5 per acre is located.

A. It is all the way from ten to fourteen miles.

Cross-examination by Mr. N. B. FIELD:

Q. Is that mental assumption of yours based upon a value of $5 per acre as to the Dawson field?

A. No sir.

Q. Less than that?

A. No sir, that is whatever portion of that may be underlaid with coal——

Q. Oh, you have estimated or assumed that only a portion of the land is underlaid with coal along with your other assumptions?

A. I have no information it is all underlaid with coal.

84 Q. Consequently you come in here making assumptions of which we know nothing and undertake to estimate the value of Mr. Jones' services based upon those assumptions.

A. No sir, it is based upon whatever personal knowledge I had from going on the land; from what I had heard from different persons with reference to the coal.

Q. Now have you made any other assumptions in reaching this conclusion?

A. I think not. Simply what I have heard about it and from being on the land.

Q. About these lands you say you know of that were sold with

coal under them, for five dollars per acre, who sold them, to whom, and when were they sold?

A. Mr. Towndrow sold one tract. Mr. Darreth sold a tract. These are the ones where the coal alone was sold, and the other one I had reference to was where Alexander Wersonick gave an option on his land, that is the land and the coal both, but that option was given at the rate of seven dollars per acre.

Q. How many acres were in each one of those tracts of land?

A. I don't know the number in the Towndrow tract. In the Darreth tract the parties both told me three hundred and twenty acres. In the Wersonick tract, that I had personal knowledge of, it was something less than eight hundred acres. That is as represented by the parties. I never saw the land; that is the only knowledge I have as to the extent of it.

Q. Was this land on the public domain?

A. Yes sir. The Towndrow and the Derreth tracts were originally taken up from the public domain. The Wersonick tract, I am not able to say whether that was taken up under the act of Congress or purchased from the Maxwell Land Grant Company.

Q. These lands that were taken up under the government were taken up as non-mineral lands, and the people who took them up were pledged under the law to make affidavit that they were more valuable for agricultural purposes than mineral purposes, weren't they?

85

A. Of my knowledge, I don't know how they were acquired, except I know they were off the Maxwell Land Grant and were once a part of the public domain.

Q. Do you know what the Government price of coal land fifteen miles from a railroad has been for many years—has it not been $20 per acre?

A. That is my recollection of it.

Q. Do you know whether this land that you have been testifying about was more valuable for agricultural purposes than for the mineral on it.

A. From the examination I made of the Darreth tract I would say it was more valuable for coal.

Q. And that was a piece of government land—the Darreth tract originally.

A. It certainly was at one time.

The plaintiffs by counsel moved the court to strike out so much of the testimony of the witness Leahy as expressed his opinion as to the value of the services of A. A. Jones in the case of the Maxwell Land Grant Company *vs.* John B. Dawson for the reason that it affirmatively appears from the testimony of the witness that his opinion as to the value of those services is based upon an assumption by him as to the value of the land in controversy in that case which assumption is not disclosed to the jury and is therefore not based upon the evidence in the case. But the court overruled the said motion, to which the plaintiffs then and there excepted and still except.

EUSEBIO CHACON, a witness on behalf of the defendants, was sworn and examined and his testimony tended to show that he is a lawyer by profession and resides in Las Vegas; that he was
86 admitted to the bar in June, 1891, and practiced continuously until 1893, when he removed to Santa Fe and suspended practice until 1896; after 1896 he practiced law in Colorado until August, 1899, and thereafter practiced continuously in New Mexico; that he has glanced in a general way over the transcript of the record in the Supreme Court of the United States in the case of the Maxwell Land Grant Company *vs.* Dawson and is acquainted with its contents in a general way; that assuming in addition to the matters shown by the decisions and the records and proceedings of that case that it was tried a second time in the District Court of San Miguel County and resulted in a verdict and judgment in favor of the defendants; and that an appeal to the Supreme Court of the Territory of New Mexico was dismissed on motion of the plaintiff's counsel, he can, from his knowledge of the case, derived from the sources mentioned, express an opinion as to the value of the services of A. A. Jones in that case, upon the assumption that there was no contract between Mr. Jones and the person who employed him in that case and bearing in mind the responsibility of counsel, the care, the labor and interest involved in such matters as well as the actual labor performed and the character of the legal questions involved, together with the nature of the services, the results obtained in the case and the standing of the attorney for professional skill and knowledge and also the price generally charged by members of the bar in the same forum in similar cases, the value was not less than $2,875 and not more than $3,500.

On cross-examination the witness stated that in arriving at the value of the services of Mr. Jones, he assumed that the area in litigation was about twenty-three thousand acres, and the value of those acres in an unimproved condition will be the Government value of $1.25 per acre; that the mere fact that there may be croppings of coal on the surface of the land in the absence of a geological
87 survey determining the area of that coal formation, and its quality, does not justify the witness *to* believing that it was coal land, and consequently witness calls it grazing land, and gave it the value that the Government gives to grazing land, therefore giving it a total value of $28,750; and then took ten per cent. of that value as the value of Mr. Jones' services; witness also assumed on a different phase of the case, that Mr. Jones' services as a lawyer of known skill and ability would be worth something like fifty dollars per day while in the actual service and defense of the case, and witness assumed that he would be engaged in a case of this character not less than seventy days, upon this basis of calculation the fee would be thirty-five hundred dollars, but upon the assumption of the value of the land as witness' basis, taking in the other elements, witness would say the fee should be $3,375.00, which should include his traveling and personal expenses.

The witness was cross-examined at length as to the basis of the calculations and assumptions and was then asked:

Q. Now let me make some assumptions for you and take your opinion upon that basis. Assume that the property in controversy in that case was at all times of the value of not less than $350,000; that the case was one that was practically without precedent on its facts so far as reported cases are known to lawyers,—that the defendant entered into the possession under a deed and claimed under the deed for several years and in order to maintain his title, turned his back on his deed and claimed by adverse possession, and that the questions involved in the case were of the most intricate and difficult character, requiring the highest skill, ability and learning for their proper presentation, what in your opinion would be the value of Mr. Jones' services in such a case.

A. I do not assume Mr. Field that the property was of that value.

88 Q. Will you answer my queston on the basis of all the assumptions I have furnished you.

A. Before I answer the question I desire to say to counsel, that I do not assume that the property was at all times worth $450,000. In estimating the reasonable value of this contract of this implied contract for professional services, I take as one of the elements, not the controlling element, but one of the facts in consideration, the value and extent of the land. In a small case of an acre or say of a lot, that would be practically valueless, the extent and value would not be a consideration, then the services rendered by the attorney are the sole considerations there. But I will answer your question.

(Question repeated to witness.)

(WITNESS:)

A. In the absence of an express contract, would still say it would be ten per cent. of the value.

The witness further testified at length as to his reason for the conclusion stated.

ELISHA V. LONG, a witness on behalf of the defendants, was sworn and examined and his testimony tended to show that he is a member of the bar, having been admitted in the winter of 1859 and practiced law in Indiana from the time of his admission with the exception of the time he was on the circuit bench in Indiana until he came to New Mexico in 1885; that he went on that bench in 1872 or 1873 and continued on that bench until he came to New Mexico in 1885 and was Chief Justice of New Mexico continuously until 1890 or 1891; that he has since practiced law in Las Vegas and that he knows the plaintiff, A. A. Jones, and has known him since 1886 and practiced at the same bar with him; that he is familiar with the ejectment suit of the Maxwell Land Grant Company *vs.* John B. Dawson; and assuming that the property involved in that suit at the

89 time of the final termination of the litigation was worth forty thousand dollars and about four years thereafter sold for four

hundred and fifty thousand in round figures, he is able to state what would be a reasonable fee for the services of Mr. Jones in that case and in his opinion from three thousand to five thousand dollars would be a reasonable fee.

On cross-examination the testimony of the witness tended to show that in his opinion the value of the property involved in litigation was to be taken into consideration in determining the value of the services but was not controlling in the absence of a contract.

LEWIS C. FORT, a witness on behalf of the defendants, was sworn and examined and his testimony tended to show that he was first admitted to the bar in 1869 and commenced the practice of law at Little Rock, Arkansas, in 1876; that he had been continuously engaged in the practice of law in New Mexico for many years and has known A. A. Jones ever since he was admitted to the bar; that he is familiar with the case of the Maxwell Land Grant Company *vs.* Dawson, and represented the plaintiff upon the second trial of that case; and assuming that the property was worth at the time the litigation closed, forty thousand dollars and about four years afterwards sold for four hundred and fifty thousand dollars, he could express an opinion as to the reasonable value of Mr. Jones' services in that case and in his opinion from three to five thousand dollars would be a reasonable fee for such services.

On cross-examination the testimony of the witness tended to show that in his opinion the value of the property in controversy in such suit was not controlling but was to be taken into consideration, in determining the value of Mr. Jones' services.

The defendants thereupon offered in evidence a letter from
90 A. A. Jones to John B. Dawson, which letter is in words and figures as follows:

JULY 31ST, 1901.

John B. Dawson, Esq., Dawson, N. M.

MY DEAR MR. DAWSON: You are doubtless aware that there has been no settlement of the compensation due to me in the litigation between the Maxwell Land Grant Company and yourself. I had hoped and still hope that this matter may be amicably adjusted. I expected to arrange with Mr. Fiske, who represents a share in this to go with me today to see you and Mr. Charles Springer in regard to this matter. I find it is impossible for him to go at this time, and it would also be very inconvenient for me to go at present.

The statute of limitations will bar this cause of action on August 7th, and Mr. Fiske has insisted that suit be brought at the present time so as to prevent the running of the statute of limitations, but with the hope that the matter may be adjusted without a trial.

My relations with you and Mr. Charles Springer have been and are such that nothing could be more disagreeable to me than to have hostile litigation between us, and to the end that we may come to some adjustment of the matter I have arranged with Dr. Cunningham, who is trustee of this claim, to go with me and personally interview you and Springer. Dr. Cunningham will not be able to get

away from here for one or two weeks, and I wish you would indicate at what time it would be convenient for us to see you and Mr. Springer. I want to talk over the matter fully with you both and do not expect to insist upon anything but what is fair and right in every particular.

I am sorry I could not have had this interview before the institution of the suit, but it is now impracticable to have it otherwise.

I have understood that you arranged with Mr. Springer
91 for him to pay all the costs of the litigation, but inasmuch as there was nothing between him and me, or between you and me, that he should be legally obligated to me for the compensation, it is necessary to make you a party to the suit, but I have no doubt that whatever arrangements you have made with Mr. Springer will be carried out. It *it* would be satisfactory for you and Mr. Springer to meet Dr. Cunningham and me here or at Springer, I wish you would so arrange it as that would be more convenient to us. However, if it will not be convenient for you to do so, we can arrange to meet either at your house or at Springer's house.

Assuring you of my highest regard and friendship, I am,

Very Truly Yours, A. A. JONES.

P. S.—I sent a copy of this letter to Mr. Charles Springer.

Truly Yours, A. A. JONES.

And thereupon the defendants rested.

HENRY W. KELLY, a witness on behalf of the plaintiffs, was called in rebuttal and his testimony tended to show that at Mr. Dawson's house in Colfax County, New Mexico, in the month of May, 1899, he had a conversation with John B. Dawson in the presence of Dionicio Martinez in which the defendant, John B. Dawson, brought out a prospectus setting out the attractions and value of his tract of land there which he had acquired from the Maxwell Land Grant Company through a suit, and said that he would like very much to try to dispose of it; that he was in debt and that Charles Springer and Jones had an interest in the property for their services that the interest of Mr. Jones was for defending the suit *vs.* the Maxwell Land Grant Company.

92 A. A. JONES was recalled in rebuttal and his testimony tended to show that the first money paid to him by Charles Springer was one hundred dollars on the 10th day of October, 1891, and that was part of the fee in the case of the Maxwell Land Grant Company *vs.* John B. Dawson, in 1892 Charles Springer paid him two hundred dollars more on account of services in that case; in the month of March, 1894, Charles Springer paid him two hundred dollars for the purpose of paying his expenses of his trip to the City of Washington in connection with the case of the Maxwell Land Grant Company *vs.* John B. Dawson and that these sums were the total amount paid by Springer to the witness on account of services and expenses in connection with that case; that Springer paid him other sums of money on account of other services as follow : In

February, 1892, two hundred and fifty dollars on account of the assignment of Marcy Geer and McCarn, he was assignee of that banking firm. In the month of March in the same year he paid another two hundred and fifty dollars on account of the same matter; in the month of October, 1892, he as a member of a committee of the Cattle Association, paid me five hundred dollars on account of the prosecution of the case of the Territory *vs.* Hill and North; in the month of April, 1893, he paid five hundred dollars on account of litigation of the Palo Blanco Cattle Company *vs.* Stephen W. Dorsey and others and Charles Springer was one of the others in that suit; in the month of December, 1893, he paid three hundred dollars more on account of the Marcy Geer and McCarn assignment and in the month of September, 1894, he paid seven hundred and fifty dollars more on the same account; in the month of June, 1895, he paid me two hundred dollars for the Cattle Association in connection with the prosecution of Hill and North; in January, 1896, he paid me three hundred dollars more on the same account; in April, 1899, he gave to witness an acknowledgment of in-
93 debtedness of five thousand dollars on account of legal services performed in the Dorsey litigation, but after the contract was executed he thought it ought not to have been for more than four thousand five hundred dollars, and in a subsequent settlement witness accounted to Mr. Springer for two hundred and fifty dollars on account of that contract, the amount due witness being considered as four thousand five hundred dollars for that fee; in May, 1901, he paid witness nine hundred and fifty dollars on account of the assignment of Marcy Geer and McCarn; and these were the only items Charles Springer ever paid to witness on account of legal services of himself or anybody else; the total amount of these items are just nine thousand dollars; and these items had no connection whatever with the Maxwell Land Grant Company suit, that — the time of witness's employment by Charles Springer in the Maxwell Land Grant Company suit nothing was said about his giving any other business to the witness and he never had at any time given the witness to understand in any way that any of the other business, which witness was attending to for him, was as compensation which he was paying witness or had any connection whatever with the case of the Maxwell Land Grant Company.

Said witness was recalled and his testimony tended to show that he remembered very well the conversation between himself and the defendant John B. Dawson, as previously testified in this trial and that Mr. Dawson is mistaku in some respects as to what occurred at that conversation at Raton. Witness' version of the conversation was as follows: I had just come from Springer's office and I said to Mr. Dawson that Springer and I could not agree about the settlement of my compensation. I asked him if he could not do something to get Springer to do what was right, and I told him I had understood that he had a contract with Springer whereby Springer was to pay all of the expenses of that litigation, and if that
94 were true, and he was not obligated to pay the fee that he ought not to have to pay it, and I wanted him to see Springer and see if we could not bring about some settlement. He said it

was true that Springer had agreed to pay the fee, and that he had nothing further to do with it, but he ad-ed this: He says, "Notwithstanding that, if I ever get anything out of the property, I will see that you get a nice fee." There was nothing said in that conversation by him to the effect that Springer had told him I had agreed to do that work for five hundred dollars. It is at that point where Mr. Dawson is in error. I never heard or had any intimation that it was claimed by Springer that I was doing that work for five hundred dollars until after this suit was instituted.

Witness also remembered the testimony of Charles Springer with reference to the conversation which took place at Springer between the witness and Dawson, and Springer was not present at the conversation, and did not hear it, he came into the room to use the telephone while the conversation was going on but took no part in the conversation.

And thereupon the plaintiffs rested.

JOHN B. DAWSON was again called by the defendants and testified that he did not in any conversation with A. A. Jones in Raton, ever say to him, Jones, that if witness ever got anything out of that property he would see that Jones got a nice fee or anything of that kind.

The foregoing is an abstract of all of the material evidence in the case.

95 And thereupon the court charged the jury as follows:

GENTLEMEN OF THE JURY:

1.

This is a civil action brought by the plaintiffs to recover the reasonable value of the legal services of Mr. A. A. Jones, as an attorney for the defendant, John B. Dawson, in a certain action of ejectment brought by the Maxwell Land Grant Company for the possession of certain lands in the County of Colfax, Territory of New Mexico. The complaint is in three counts.

The first count alleges the performance of certain legal services by the plaintiff, A. A. Jones, for the defendants in a certain cause entitled, the Maxwell Land Grant Company *vs.* John B. Dawson, being cause number 4123 on the Civil Docket, of the District Court of San Miguel County, Territory of New Mexico. It is alleged that the services of said A. A. Jones, in that suit, were of the reasonable value of $75,000; and that this sum became due to the said Jones on the 7th day of August, 1897. In this count no express promise of defendants to pay any particular sum of money for such services is alleged; it is simply a count to recover the reasonable value of said services alleged to be $75,000.00.

The second count is a count for the same amount on account of an indebtedness of that amount claimed to have been due on the 7th day of August, 1897, from the defendants to the plaintiff, A. A. Jones. This indebtedness is alleged to have arisen from the labor,

service, care and diligence of said Jones as an attorney and counsellor at law before that time done and bestowed in and about the business of defendants at their request, and that the defendants in consideration thereof, then and there promised the said plaintiff, Andrieus A. Jones, to pay him the said sum of money on request.

96 In the third count it is alleged that on a day and month, not stated, in the year 1891, the defendant, John B. Dawson, was the owner and claimant of a large tract of valuable land situated in the County of Colfax and Territory of New Mexico, of very great value, to wit: Of the value of five hundred thousand dollars, and that thereafter certain litigations and law suits were commenced against the said defendant, John B. Dawson, by the Maxwell Land Grant Company, and that in the year 1891, the said John B. Dawson made and entered into an agreement to convey and thereafter did convey to the defendant, Charles Springer, a one-half interest of all the said land in consideration that the said Charles Springer should pay all costs and expenses of carrying on and conducting to final determination the defense of said claims to said lands set up and made by said Maxwell Land Grant Company; that in pursuance of said agreement the said defendant, Charles Springer, on behalf of himself and the said John B. Dawson made and entered into an agreement with the plaintiff, Andrieus A. Jones, as an attorney and counsellor at law, whereby the said Jones agreed to take and manage the defense of said litigations and for his services he was to receive a reasonable compensation, and that thereafter the said Jones did take charge of, manage and control the defense of said litigation, to a successful issue, of which said defendants had notice, and that the reasonable compensation therefor was and is the one-half of the value of the undivided one-half interest in said valuable lands so set apart for the costs and expenses of conducting the said defense, and that the net value of said one-half is the sum of $75,000.00.

In each of these counts it is alleged that in a certain cause in the District Court of San Miguel County, New Mexico, wherein Ida M. Jones was plaintiff and Andrieus A. Jones was the defendant, a decree was duly made and entered by the consent of said

97 plaintiff and defendant in said cause, whereby the said fee and compensation was vested in the plaintiff herein, Joseph M. Cunningham, as trustee, for the sole use and benefit of the plaintiff herein, Ida M. Jones, and said plaintiff, Andrieus A. Jones. Each of these counts also alleges that the amount therein alleged to be due to the plaintiff is due and unpaid.

The answer of the defendants sets up three grounds of defense.

First: By a general denial of each and every allegation of plaintiff's complaint; (2.) By plea that the demand for the recovery of which this action is brought was paid before the commencement of this action; and third, by a plea of the statute of limitations; namely: That this action was not commenced within four years from the time the cause of action accrued.

The reply of the plaintiffs consists of a denial of each and every allegation contained in the second and third averments of said

answer; in other words, a denial of the pleas of payment and of the statute of limitations hereinbefore referred to.

2.

Plaintiffs in their complaint do not allege or sue for any interest in the lands involved in said suit.

3.

The defendants claim that Mr. Jones was employed to defend the said suit under a specific contract by which he agreed to give his services throughout the entire litigation in said suit for the sum of five hundred dollars; that said sum of five hundred dollars was fully paid before the commencement of this action.

4.

Plaintiffs admit that there was a contract made at the time of Mr. Jones' employment in said cause fixing the amount of his compensation at five hundred dollars for the trial of the cause in
98 the District Court and Supreme Court of the Territory, and that three hundred dollars was paid to plaintiff, Jones, under said contract, but they deny that said contract covered any services of Jones in the Supreme Court of the United States, or when said cause came back for trial to the District Court and Supreme Court of this Territory for the second trial.

5.

Plaintiffs claim, however, that the original contract in relation to the services of A. A. Jones was modified by a subsequent agreement made with the defendant, Charles Springer, to the effect that his compensation was not to be limited to the five hundred dollars originally fixed, but that he should go on with the litigation, see how it came out, and then Charles Springer would do what was right, and after the property should be sold he would pay said Jones a big cash fee.

6.

There are, therefore, three aspects of the case which the jury have to consider:

1. Were the terms of the contract such as are claimed by plaintiffs, and was the compensation then agreed upon paid?

2. Was there a contract in the terms as claimed by the defendants, and was the compensation agreed upon by such contract paid?

3. Was the original contract modified or set aside by a subsequent agreement of the parties?

7.

The court instructs the jury that before there can be a contract between two parties the minds of the two parties must come together and agree upon all the terms and conditions of the contract; or as is sometimes said, the minds of the contracting parties must meet.

8.

If the jury believe from the evidence that the original
99 contract in relation to Mr. Jones' compensation was afterwards modified so that such compensation was not to be limited to the $500.00 agreed upon, then you should find for the plaintiffs in such sum as you believe from the evidence to be the reasonable value of the services of Jones less whatever sum may have been paid thereon.

9.

In determining the compensation, if any, to be recovered for the services of the plaintiff Jones as attorney in said suit, it is proper for the jury to consider the amount and character of the services rendered, the labor, time and trouble involved, the character and importance of the litigation in which the services were rendered; the value of the property affected; the professional skill and experience called for, the character and standing in his profession of the attorney, and whether or not the fee is absolute or contingent; it being the recognized rule that an attorney may properly charge a much larger fee when it is to be contingent than when it is not so. The value of the property to be considered by the jury in such case, means such value at the conclusion of the litigation and not any increased value which it may have acquired by circumstances arising afterwards, if there was any increase by reason of such circumstances.

10.

In determining the value of the plaintiff Jones' services, the jury should consider the testimony of the witnesses who have testified as to the value of such services; but the jury are not bound by the opinion of said witnesses, unless the jury shall find from all the evidence taken together, including the nature of the services, the time occupied in the performance of them, and the result of them, and the benefit derived by the defendants from the rendition of such
services, that said opinions are correct. It is the province of
100 the jury to weigh the testimony of the witnesses as to the value of the services by reference to their nature, the time occupied in their performance, and the other attending circumstances above mentioned, and by applying to it their own experience and knowledge of the character of such services.

11.

If the jury believe from the evidence that the original contract was as claimed by the plaintiffs, and that the same was not afterwards modified or set aside, then you should find for the plaintiffs in whatever sum may remain unpaid on said contract, if any does so remain, and in addition thereto, the reasonable value of the services of plaintiff, Jones, rendered upon the appeal of said suit to the Supreme Court of the United States; and the reasonable value of the services of plaintiff Jones, rendered upon the second trial in the District Court of this Territory and on the second appeal to the Supreme Court of this Territory.

12.

If the jury believe from the evidence that the defendant, Charles Springer, made and entered into a contract with plaintiff, A. A. Jones, under which contract it was agreed by the said Jones that he would conduct the defense in the action of the Maxwell Land Grant Company against John B. Dawson, through the entire litigation for the sum of five hundred dollars, and that such contract was not afterwards modified or rescinded, then you should not consider the evidence of the various attorneys who have testified to the reasonable value of the services of the said Jones, but should disregard the same, for the reason that the contract has limited and fixed the amount to which said Jones is entitled; and if you so find, and further believe from the evidence that the said Charles Springer has paid to the said Jones the said sum of five hundred dollars, as agreed upon
101 and fixed by said contract, then you should find in favor of the defendants.

But if the jury believe from the evidence that a contract was made as just stated, and that any part of the said sum of five hundred dollars has not been paid, then you should find for the plaintiffs as to such portion of said five hundred dollars as you may find remained unpaid at the commencement of this suit.

13.

In this case the burden of proof is upon the plaintiffs as to every material fact, except that of payment, as to which fact the burden of proof is upon the defendants. In order to entitle the plaintiffs to recover in this case they must establish every such material fact with the exception aforesaid by a preponderance of the evidence; and if you find that the evidence bearing upon the plaintiffs' case is evenly balanced or that it preponderates in favor of the defendant, then the plaintiffs cannot recover, and you should find for the defendants.

14.

The jury are instructed that preponderance of the evidence in this case is not alone determined by the number of witnesses testifying to a particular fact or state of facts. In determining on which side the preponderance of evidence is, the jury should take into consideration the opportunities of the several witnesses for seeing or knowing the things to which they testified; their conduct and demeanor while testifying; their interest or lack of interest, if any, in the result of the suit; the probability or improbability of the truth of their several statements in view of all the other evidence, facts or circumstances proved on the trial, and from the facts and circumstances determine upon which side is the weight or perponderance of the evidence.

15.

You are the sole judges of the weight of the evidence and the credibility of the witnesses who have testified before you, and
102 in determining the issues of this case, you must, however, take into consideration the whole of the evidence introduced

before you, that you believe to be true, and all of the facts and circumstances proved on the trial; giving to the several parts of the evidence such weight as you may think it entitled to. You must, however, in determining this case, consider all the evidence that you believe to be true.

16.

After counsel have addressed you, you will retire to your jury room and deliberate upon your verdict. Forms of verdict will be handed you. When you retire you will first select a foreman, and when you have agreed upon your verdict your foreman will sign it and you will all return it into court.

To the action of the court in giving to the jury the propositions contained in paragraph 13 of the foregoing charge, the plaintiffs by their counsel, then and there objected, for the reason that the court therein fails to tell the jury what are the material facts in the case, and leaves to the determination of the jury the question of the materiality of each and every fact in evidence, and because it erroneously assumes that the defense of payment set up in the answer involves a single fact and not several facts, and fails to tell the jury that on the issue of payment made by the pleadings, it devolves upon the defendants to show by a preponderance of the evidence that there was an agreemnt on the part of plaintiff, A. A. Jones, to perform the services performed by him in the ejectment suit for a fixed sum, to wit, five hundred dollars, and that said sum of five hundred dollars had been paid prior to the institution of the suit, in order to maintain the plea of payment; and because it fails to tell the jury that there is no evidence from which they would be authorized to find that the defendants had, prior to the institution of the suit,
103 paid to the plaintiffs or any of them the reasonable value of the services rendered by A. A. Jones in the said ejectment suit, but the court overruled the said objection, and gave the said charge, notwithstanding the said objection, to which action of the court the plaintiffs then and there excepted and still except, and thereupon, at the request of the plaintiffs, the court instructed the jury as follows:

I.

The court instructs the jury that the instrument introduced in evidence as plaintiff's exhibit No. 1, operated in law to vest in the defendant Charles Springer a present title to an undivided one-half interest in and to all the coal, coal oil, fire clay and all other minerals or mineral substances, whether base or precious, in and upon the tract of land described therein together with the right of way through and over said lands for all roads, tramways and railways necessary for the advantageous working of said minerals and mineral substances, and that said instrument became immediately operative, upon its delivery, to vest such title in said Springer.

II.

The court instructs the jury that the instrument introduced in evidence as plaintiff's exhibit No. 2, operated in law to vest in the

defendant, Charles Springer, a present title in fee simple to an undivided one-half interest in and to the land therein described including all minerals and mineral substances found or contained therein.

III.

If the jury believe from the evidence that the defendant, Springer, was, at the time of the employment of the plaintiff, A. A. Jones, in the case of the Maxwell Land Grant Company *vs.* John B. Dawson, bound by contract with Dawson to pay the compensation of
104 said Jones, and thereafter, the said Jones, with knowledge of this fact agreed to look to Springer for payment of his said compensation, such arrangement in law releases said Dawson from all liability to said Jones or to the plaintiffs and renders the said Springer solely liable for whatever, if anything, remained unpaid to said Jones on account of his services in said case.

IV.

If the jury believe from the evidence that the defendant Charles Springer concealed from the plaintiff, A. A. Jones, the fact that the said Springer was interested in the subject matter of the case of the Maxwell Land Grant Company *vs.* John B. Dawson, and was bound by contract with Dawson to pay for the services which he was engaging said Jones to render in said cause with the intent to deceive the said Jones and thereby procure the said Jones to agree to take the case for a fee of five hundred dollars, and if the jury further believe from the evidence that said Jones was thereby deceived and induced to enter into a contract which he would not have made if he had known the true relation of said Springer with reference to said suit, then such agreement or contract is not binding on the said Jones, and plaintiffs in this suit are entitled to recover for the services of said Jones in the said case whatever the same may be reasonably worth, as shown by the evidence in the case.

V.

The court instructs the jury that what is meant by the expression "market value" as applied to land is not the price that land would bring at a forced sale, but what it or land similarly situated would bring at a sale after due notice and under fair conditions. "Market value" means a fair value of property as between one who wants to purchase and one who wants to sell, and not what could be obtained for it under peculiar circumstances, but what it would bring
105 at a fair sale when one party wanted to sell and the other wanted to buy. A "market value" as above defined, is not necessary to establish the value of property which is the subject of a judicial valuation. Property is often the subject of such valuation for which no proof of value in the market could be given because it is not brought into the course of trade and is not known in the market, and therefore, is incapable of any estimate in that mode. In all such cases the real value is to be ascertained from such elements of value as are attainable.

And thereupon the plaintiffs asked the court to instruct the jury as follows:

If the jury believe from the evidence that the plaintiff, A. A. Jones, agreed with the defendant, Chalres Springer, to defend the case of the Maxwell Land Grant Company *vs.* John B. Dawson, for a fee of five hundred dollars, and that thereafter and before the rendition of all the services agreed to be rendered by said Jones in said cause, the said Springer said to the said Jones, "You cannot be expected to attend to this business for any five hundred dollars; go on with the case, and we will see how we come out, and after it is all over, you will be paid what is right," or words to that effect, and such proposition was accepted and acted on by said Jones, then the plaintiffs in this case are entitled to recover for the services of said Jones in said case whatever the same may be reasonably worth, as shown by the evidence in this case.

But the court refused to give the said instruction, to which action of the court the plaintiffs then and there excepted and still except; and thereupon the plaintiffs asked the court to instruct the jury as follows:

The court instructs the jury that the credibility of the witnesses is a question exclusively for the jury; and the law is, that where two witnesses testify directly opposite to each other, the jury are not bound to regard the weight of the evidence as evenly bal-
106 anced. The jury have a right to determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor and fairness; their apparent intelligence or the lack of intelligence, and from all of the other surrounding circumstances appearing on the trial, which witness is the more worthy of credit and to give credit accordingly.

But the court refused to give the said instruction, to which action of the court the plaintiffs then and there excepted and still except; and thereupon the plaintiffs asked the court to instruct the jury as follows:

The jury are instructed, that the preponderance of evidence in the case is not alone determined by the number of witnesses testifying to a particular fact, or state of facts. In determining upon which side the preponderance of the evidence is, the jury should take into consideration the opportunities of the several witnesses for seeing or knowing the things about which they testify; their conduct and demeanor while testifying; their interest or lack of interest, if any, in the result of the suit; the probability or improbability of the truth of their several statements, in view of all the other evidence, facts and circumstances proved on the trial; and from all these circumstances determine upon which side is the weight or preponderance of the evidence.

But the court refused to give the said instruction, to which action of the court the plaintiffs then and there excepted and still except; and thereupon the plaintiffs asked the court to instruct the jury as follows:

The court instructs the jury that in determining the value of the services of the plaintiff, A. A. Jones, in the case of the Maxwell Land Grant Company *vs.* John B. Dawson, they should take into

consideration the nature and character of the questions raised in the case, the responsibility, the care, anxiety, and mental labor
107 involved in the proper preparation and presentation of those questions, the value of the property in controversy in said cause and the result attained therein, and also, the professional skill required to properly present the questions arising in the case, and Mr. Jones' standing and reputation as to the possession of such skill.

But the court refused to give the said instruction, to which action of the court the plaintiffs then and there excepted and still except.

And thereafter the argument of counsel to the jury proceeded, and after the argument of one counsel on behalf of the plaintiffs and of both counsel on behalf of the defendants had been concluded, and before the beginning of the closing argument by Mr. Field on behalf of the plaintiffs, the court said to the jury:

"GENTLEMEN OF THE JURY:

"In the thirteenth instruction given you by the court, in which I spoke about the burden of proof, I have concluded to modify that instruction by striking out the words *material fact*, in the second line and inserting in lieu thereof, the word *issue;* and also in the same line the word *fact* and insert in lieu the word *issue,* and in the fifth line strike out the words *material fact* and put in the word *issue.*—— So the instruction will read, gentlemen, as follows:

"In this case the burden of proof is on the plaintiffs as to every issue, except that of payment, as to which issue the burden of proof is upon the defendants. In order to entitle the plaintiffs to recover in this case they must establish every such issue with the exception aforesaid by a preponderance of the evidence; and if you find that the evidence bearing upon the plaintiffs' case is evenly balanced, or that it preponderates in favor of the defendants, then the *pal*intiffs cannot recover, and you should find for the defendants.

"Now, gentlemen, I will withdraw instruction No. thirteen
108 given to you before and insert and give this amended instruction instead."

The court read the foregoing amended instruction from a carbon copy of the original charge in which the words above mentioned as stricken out were crossed out with a pencil, and the words mentioned as having been inserted were written in with a pencil. After the foregoing amended instruction was read to the jury, Mr. Field, of counsel for plaintiff, said to the court:

(Mr. FIELD to Court:) As thus modified, I think the charge is absolutely without objection, if the court please.

The amendment to the thirteenth instruction by the court to the jury, as thus made was also taken down by the court stenographer and transcribed by the said stenographer from his notes of the proceedings of the trial and attached to the original charge on file, after the verdict of the jury had been returned.

The defendants requested the court to give to the jury the following instructions:

If the jury believe from the evidence that the plaintiff, A. A. Jones, entered into a contract with defendants, or with the defendant,

Charles Springer, alone, to defend the action of ejectment brought against the defendant John B. Dawson by the Maxwell Land Grant Company, in the courts of the Territory, and also the Supreme Court of the United States, for the sum of five hundred dollars, and that the plaintiff, A. A. Jones, entered on the discharge of his duties under such contract, then during the pendency of such litigation, and while the relation of attorney and client existed between the parties, such contract could not be so changed as to make it possible for plaintiff, Jones, to receive a larger compensation than that agreed upon at the time of his employment under the contract sought
109 to be changed, and any attempted change thereof providing for increased compensation is illegal and void, and cannot form the basis of recovery in this case.

The plaintiff, A. A. Jones, testified that he and the defendant, Charles Springer, entered into a contract in which he, the said Jones, undertook to defend the action prosecuted by the Maxwell Land Grant Company against John B. Dawson, in the District and Supreme Courts of New Mexico, for the sum of five hundred dollars, and that afterwards, immediately after the first trial of said cause, in the District Court of San Miguel County, he, the said Charles Springer, stated to him that he, Jones, "Could not be expected to defend the cause for any five hundred dollars, and that he (Jones) should proceed with the case, and that he (Springer) would "pay him what was right.'"

You are instructed that although you may believe from the evidence that the said Charles Springer did make such statements to the said Jones, still such statement- would not have the effect to qualify, modify, rescind, or in anywise change the original contract made between the said Jones and Springer, but that such statement was a mere gratuitous offer on the part of the said Springer, which cannot be enforced against the said Springer, and which has no legal effect in obligating the said Springer to compensate the said Jones differently or in a greater amount than the amount fixed by the original contract; and you are instructed that if you believe that the said Springer has paid the said Jones the said sum of five hundred dollars as originally contracted, then you should find the issues for the defendant.

But the court refused to give either of the said instructions so requested, and the foregoing were all of the instructions asked, given and refused at the said trial.

110 The jury having returned a verdict in favor of the defendants, the plaintiffs filed a motion for a new trial, which is in words and figures as follows, to-wit:

Come now the plaintiffs, by their attorneys, and move the court to set aside the verdict of the jury in the above-entitled cause and to grant them a new trial therein for the following reasons, to-wit:

I.

Because the court erred in refusing to admit evidence offered by the plaintiffs as to the professional standing and reputation of the plaintiff, A. A. Jones, although he instructed the jury as follows: "In

determining the compensation, if any, to be recovered for the services of the plaintiff, Jones, as attorney in said suit, it is proper for the jury to consider the amount and character of the services rendered, the labor, time and trouble involved, the character and importance of the litigaton in which the services were rendered; the value of the property affected; the professional skill and experience called for, the character and standing in his profession of the attorney, and whether or not the fee is absolute or contingent; it being the recognized rule that an attorney may properly charge a much larger fee when it is to be contingent than when it is not so. The value of the property to be considered by the jury in such case means such value at the conclusion of the litigation and not any increased value which it may have acquired by circumstances arising afterwards, if there was any increase by reason of such circumstances.

II.

Because the court erred in admitting illegal and improper evidence as to the value of the services of plaintiff, A. A. Jones, the same being the opinions of the witnesses, John D. W. Veeder, R. E. Twitchell and Jeremiah Leahy, each of whom was permitted to express an opinion as to the value of said services, although
111 it appeared from the testimony of each of said witnesses, on cross-examination, that the value of the property involved in the case of the Maxwell Land Grant Company *vs.* John B. Dawson was a material element in arriving at his opinion and each of said witnesses had fixed in his mind an arbitrary valuation on said property which was not disclosed to the jury and was not shown to be based on the evidence in the case *or* the personal knowledge of the witness.

III.

Because the court erred in refusing to withdraw from the consideration of the jury the opinion of the witness, John D. W. Veeder, as to the value of the services of the plaintiff A. A. Jones in the case of Maxwell Land Grant Company *vs.* John B. Dawson, when requested to do so by the plaintiff after it had been made to appear by cross-examination of the witness that his opinion was materially influenced by the value of the property in said cause — that he had arbitrarily assumed a valuation of said property which was not disclosed to the jury, and was not shown to be based on the evidence in the case or the personal knowledge of the witness.

IV.

Because the court erred in refusing to withdraw from the consideration of the jury the opinion of the witness R. E. Twitchell as to the value of the services of the plaintiff A. A. Jones in the case of the Maxwell Land Grant Company *vs.* John B. Dawson when requested to do so by the plaintiffs after it had been made to appear by cross-examination of the witness that his opinion was materially influenced by the value of the property in said cause, and that he had

arbitrarily assumed a valuation of said property which was not disclosed to the jury and was not shown to be based on the evi-
112 dence in the case or the personal knowledge of the witness.

V.

Because the court erred in refusing to withdraw from the consideration of the jury the opinion of the witness Jeremiah Leahy as to the value of the services of the plaintiff A. A. Jones in the case of Maxwell Land Grant Company *vs.* John B. Dawson, when requested to do so by the plaintiffs after it had been made to appear by cross-examination of the witness that his opinion was materially influenced by the value of the property in said cause and that he had arbitrarily assumed a valuation of said property which was not disclosed to the jury, and was not shown to be based on the evidence in the case or the personal knowledge of the witness.

VI.

Because the court erred in permitting the witness R. E. Twitchell to give his opinion as to the value of coal lands in New Mexico, and in refusing to withdraw the same from the consideration of the jury when requested to do so by plaintiffs after it had been made to appear by cross-examination that the opinion of said witness as to such valuation was based upon the price which could be obtained therefor at forced sale, which basis was, by the court, declared not to be the true standard by which to measure such value, and the court's ruling on this evidence is in direct conflict with the instruction given on the request of counsel for plaintiffs, as follows: The court instructs the jury that what is meant by the expression "market value" as applied to land is not the price that land would bring at a forced sale, but what it or land similarly situated would bring at a sale after due notice under fair conditions. "Market value" means a fair value of property as between one who wants to purchase and one who
113 wants to sell, and not what could be obtained for it under peculiar circumstances, but what it would bring at a fair sale when one party wanted to sell and the other to buy. A "market value" as above defined is not necessary to establish the value of property which is the subject of a judicial valuation. Property is often the subject of such valuation for which no proof of value in the market could be given, because it is not brought into the course of trade and is not known in the market, and therefore, is incapable of any estimate in that mode. In all such cases the real value is to be ascertained from such elements of value as are attainable.

VII.

Because the court erred in refusing to give to the jury the instruction asked by plaintiffs, as follows: "If the jury believe from the evidence that the plaintiff A. A. Jones agreed with the defendant Charles Springer to defend the case of the Maxwell Land Grant Company *vs.* John B. Dawson for a fee of five hundred dollars, and that thereafter, and before the rendition of all of the services agreed

to be rendered by said Jones in said cause, the said Springer said to the said Jones, 'You cannot be expected to attend to this business for any five hundred dollars, so go on with the case and we will see how we come out, and after it is all over you will be paid what is right," or words to that effect, and such proposition was accepted and acted on by said Jones, then the plaintiffs in this case are entitled to recover for the services of said Jones in said case whatever the same may be reasonably worth, as shown by the evidence in this case.

VIII.

Because the court erred in refusing to give to the jury the instruction asked by the plaintiffs as follows: "The court instructs the jury that the credibility of the witnesses is a question exclusively for the jury; and the law is that, where two witnesses testify
114 directly opposite to each other, the jury are not bound to regard the weight of the evidence as evenly balanced. The jury have a right to determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor and fairness, their apparent intelligence or the lack of intelligence, and from all of the other surrounding circumstances appearing on the trial, which witness is the more worthy of credit and to give credit accordingly.

IX.

Because the court erred in giving to the jury the proposition contained in paragraph 13 of his charge as follows: "In this case the burden of proof is upon the plaintiff as to every material fact except that of payment, as to which fact the burden of proof is upon the defendants. In order to entitle the plaintiffs to recover in this cause they must establish every such material fact with the exception aforesaid by a preponderance of evidence; and if you find the evidence bearing upon the plaintiffs' case is evenly balanced or that it preponderates in favor of the defendant, then the plaintiffs cannot recover, and you should find for the defendants," and did not in his attempt to modify said paragraph after all arguments but the closing arguments for plaintiffs, made such modification in said paragraph, but permitted the jury to take said charge to their jury room without any alteration in said paragraph, and the same was before the jury as originally given without the modification attempted to be made, and plaintiffs were thereby prevented from deriving any benefit from such attempted modification.

X.

Because the court erred in attempting to modify paragraph 13 of his charge, as above set out, after the argument was begun and one counsel for plaintiffs had addressed the jury, and did not
115 allow sufficient time to enable counsel closing the case for plaintiffs to discuss the instructions to the jury after such attempted modification.

XI.

Because injustice was done to plaintiffs, in that the court required the closing argument to be made to the jury late at night, when the jury and counsel were so exhausted by continuous labor for several days and nights in the case that the case could not be properly presented to or considered by the jury, and because counsel for plaintiffs who was engaged in closing the case for the plaintiffs was surprised by the action of the court, when notified that he would be allowed five minutes more in which to close the case, said counsel having understood from the court that he would be allowed sufficient time to do full justice to the case, even if it were necessary to exceed the time to which the argument had been limited by the court, and there being no exigency in the condition of the business of the court requiring such action on the part of the court in order to prevent injustice to other litigants, whereby the plaintiffs were even prevented from having a fair and impartial trial in said cause.

XII.

Because the court refused to admit legal and proper evidence offered by the plaintiffs, which evidence was material to the issues in the cause.

XIII.

Because the court admitted illegal and improper evidence offered by defendants and objected to by plaintiffs.

XIV.

Because the court erred in restricting the rights of cross-examination of witnesses for defendants and in enlarging the right of cross-examination of witnesses for plaintiffs.

XV.

Because the verdict is against the law.

XVI.

Because the verdict is against the evidence.

116 XVII.

Because the verdict is against the laws and the evidence.

XVIII.

Because of divers matters and things occurring at the trial of said cause whereby plaintiffs were prevented from having a fair and impartial trial thereof.

But the court overruled the said motion, and refused to grant the new trial, to which action plaintiffs, by counsel, then and there excepted and still except.

Now, on this 17th day of July, A. D. 1903, come the defendants, by their counsel, Charles A. Spiess, Esq., and file the affidavit of William E. Gortner, Esq., court stenographer, and a certificate of Secundino Romero, clerk of the Fourth Judicial District court, as follows, to-wit:

In the District Court, Fourth Judicial District, Territory of New Mexico, County of San Miguel.

No. 5464.

JOSEPH M. CUNNINGHAM, Trustee, A. A. JONES, and IDA MAY JONES, Plaintiffs,
vs.
CHARLES SPRINGER and JOHN B. DAWSON, Defendants.

TERRITORY OF NEW MEXICO, *County of San Miguel, ss:*

William E. Gortner, being first duly sworn upon his oath, deposes and says: That he was the court stenographer of the District Court, sitting within and for the county of San Miguel, in the Territory of New Mexico, employed by the said court as the stenographer in the case of Joseph M. Cunningham, Trustee, *et al.*, plaintiffs, *vs.* Charles Springer, *et al.*, defendants, being Cause No. 5464, and that he as such stenographer took down the testimony, the rulings of the court, the objections made and exceptions taken on the trial of the said cause; that after such trial Mr. A. A. Jones, plaintiff in said cause, required him, as such court stenographer, to transcribe his stenographic notes so taken at the said trial, and which said notes included all the testimony introduced at said trial; all the rul-
117 ings of the court, and all objections made and exceptions taken on the trial; that after he transcribed his said stenographic notes he filed the same in the office of the clerk of the District Court of said San Miguel County, that being the county in which the action wherein said stenographic notes were taken was tried.

(Signed) WILLIAM E. GORTNER.

Subscribed and Sworn to before me this 17th day of July, A. D. 1903.

(Signed) S. B. DAVIS,
[SEAL.] *Notary Public.*

In the District Court, Fourth Judicial District, Territory of New Mexico, County of San Miguel.

No. 5464.

JOSEPH M. CUNNINGHAM, Trustee, ET AL.,
vs.
CHARLES SPRINGER ET AL., Defendants.

TERRITORY OF NEW MEXICO, *County of San Miguel, ss:*

I, Secundino Romero, clerk of the District Court for the Fourth Judicial District, sitting in and for San Miguel County, hereby certify that there was filed in my office on the 16th day of October, A. D. 1902, a transcript of the testimony of the witnesses, rulings of the court, objections made and exceptions taken on the trial, as taken down and certified by William E. Gortner, who was at the time the official stenographer of the court, and the proceedings had upon the trial, in the case of Joseph M. Cunningham, Trustee, *et al.*, plaintiffs, *vs.* Charles Springer and John B. Dawson, defendants, being Cause No. 5464.

Witness my hand and the seal of said court this 17th of July, A. D. 1903.

[SEAL.] SECUNDINO ROMERO, *Clerk.*

And thereupon counsel for defendants object to the signing of the foregoing bill of exceptions for the reason that it does not appear that it is impracticable to use the transcript of the steno-
118 graphic notes taken upon the trial of the said cause, and because it does appear that all the testimony, the rulings of the court, objections made and exceptions taken on the trial of said cause, were taken down by the court stenographer employed in said cause, and that the same were transcribed and filed in the office of the clerk of the District Court for said San Miguel County. Which said objection was by the court overruled and to the overruling of which the defendants, by their counsel, Charles A. Spiess, duly excepted.

And, forasmuch as the foregoing matters are not of record in the said cause, the said plaintiffs pray that this their bill of exceptions, containing an abstract of all of the material evidence given at the said trial, with the rulings of the court thereon, and the exceptions reserved thereto, and the instructions of the court as well as those given as those refused and the exceptions thereto, and the action of the court thereon, may be signed, sealed and enrolled and made part of the record and proceedings in the said cause, which is accordingly done, this Second Day of September, A. D. 1903.

WILLIAM J. MILLS, [SEAL.]
Chief Justice.

TERRITORY OF NEW MEXICO, *County of San Miguel, ss:*

I, Secundino Romero, Clerk of the District Court for the Fourth Judicial District, sitting in and for the County of San Miguel, Ter-

ritory of New Mexico, do hereby certify that the foregoing contains a full, true and complete transcript of the record in the case lately pending in said Court, wherein Joseph M. Cunningham, Trustee, *et al.*, are plaintiffs, and Charles Springer, *et al.*, are defendants, being case No. 5464, as the same appears of record and on file in my office.

Witness my hand and seal of said Court, this 24th day of November, A. D. 1903.

SECUNDINO ROMERO, *Clerk.*

119 And afterwards on to-wit, on the 24th., day of December, A. D. 1903, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an assignment of errors in the above entitled cause which said assignment of errors was and is in words and figures following to-wit:

In the Supreme Court of the Territory of New Mexico, January Term, 1904.

No. 1021.

JOSEPH M. CUNNINGHAM, Trustee, IDA MAY JONES, and ANDRIEUS A. JONES, Plaintiffs in Error,

v.

CHARLES SPRINGER and JOHN B. DAWSON, Defendants in Error.

Assignment of Errors.

Come now the plaintiffs in error, by their attorneys, and show to the court here, that in the record, proceedings and judgment of the District Court of the County of San Miguel, in the above entitled cause, there is manifest error in this, to-wit:

I.

The said Court erred in withdrawing from the consideration of the jury the statement of the witness, O. A. Larrazola, as follows.

"I will answer that by saying that I am far from considering Mr. Jones a young and inexperienced lawyer. I consider Mr. Jones as one of the best and ablest attorneys of the bar." (Trans. 52.)

II.

The said court erred in refusing to withdraw from the consideration of the jury the opinion of John D. W. Veeder as to the value of the services of A. A. Jones. (Trans. 65.)

120 III.

The said court erred in refusing to withdraw from the consideration of the jury the opinion of R. E. Twitchell as to the value of the services of A. A. Jones. (Trans. 78.)

IV.

The said court erred in refusing to withdraw from the consideration of the jury the opinion of Jeremiah Leahy as to the value of the services of A. A. Jones. (Trans. 83.)

V.

The said court erred in refusing to withdraw from the consideration of the jury so much of the testimony of R. E. Twitchell as relates to his opinion as to the value of coal lands in New Mexico, (Trans. 78.)

VI.

The said court erred in refusing to give to the jury an instruction asked by plaintiffs, as follows:

"If the jury believes from the evidence that the plaintiff, A. A. Jones, agreed with the defendant, Charles Springer, to defend the case of the Maxwell Land Grant Company *vs.* John B. Dawson, for a fee of five hundred dollars, and that thereafter and before the rendition of all the services agreed to be rendered by said Jones in said cause, the said Springer said to the said Jones, 'You cannot be expected to attend to this business for any five hundred dollars; go on with the case, and we will see how we come out, and after it is all over, you will be paid what is right,' or words to that effect, and such proposition was accepted and acted on by said Jones, then the plaintiffs in this case are entitled to recover for the services of said Jones in said case whatever the same may be reasonably worth, as shown by the evidence in this case." (Trans. 103.)

121 VII.

The said court erred in refusing to give to the jury an instruction asked by plaintiffs, as follows:

"The court instructs the jury that the credibility of the witnesses is a question exclusively for the jury; and the law is, that where two witnesses testify directly opposite to each other, the jury are not bound to regard the weight of the evidence as evenly balanced. The jury have a right to determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor and fairness; their apparent intelligence or lack of intelligence, and from all of the other surrounding circumstances appearing on the trial, which witness is the more worthy of credit and to give credit accordingly." (Trans. 103-104.)

VIII.

The said Court erred in giving to the jury paragraph 13 of the court's charge, as follows:

"In this case the burden of proof is upon the plaintiffs as to every material fact, except that of payment, as to which fact the burden of proof is upon the defendants. In order to entitle the plaintiffs to recover in this case they must establish every such material fact with

the exception aforesaid by a preponderance of the evidence; and if you find that the evidence bearing upon the plaintiffs' case is evenly balanced or that it preponderates in favor of the defendant then the plaintiffs cannot recover, and you should find for the defendants." (Trans. 99.)

IX.

The said court erred in giving to the jury an oral modification of said paragraph 13. (Trans. 105.)

122 X.

The said court erred in failing to modify in writing the original charge as read to the jury, in accordance with the oral modification attempted to be made by the court. (Trans. 105.)

XI.

The said court erred in giving to the jury a charge, a part of which was not in writing, within the meaning of the requirement of the statutes of this Territory. (Trans. 105.)

XII.

The said court erred in denying the motion for a new trial, and such denial amounts in law to an abuse of discretion by said court.

Wherefore, the plaintiffs in error pray that the same may be seen and examined by this honorable court, that the errors therein may be corrected, and that the said plaintiffs in error may be restored to all things which they have lost by reason thereof.

(Signed) NEILL B. FIELD,
Attorney for Plaintiffs in Error.

And afterwards on to-wit, on the 6th., day of January A. D. 1904, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a motion by defendants in error which said motion was and is in words and figures following, to-wit:

In the Supreme Court of the Territory of New Mexico, January Term, 1904.

JOSEPH M. CUNNINGHAM, Trustee, ET AL., Plaintiffs in Error,
vs.
CHARLES SPRINGER ET AL., Defendants in Error.

Come the defendants in error in the above entitled cause and move the Court to strike from the record in the above entitled cause the Bill of Exceptions included in the said record, commencing on
123 page 19 thereof and terminating on page 116 thereof, for the reasons:

That the said Bill of Exceptions only purports to contain therein

what the Judge certifies to be an abstract of all the material evidence given on the said trial with the rulings of the Court thereon and exceptions reserved thereto and instructions of the Court, as well those given as those refused, and the exceptions thereto, and the action of the Court thereon, and does not set out and include therein the evidence which was taken down by the Court Stenographer in said cause, the whole of the said evidence having been taken down and transcribed by the said Court Stenographer, William E. Gortner, as appear- from his affidavit included in the said Bill of Exceptions at pages 114 and 115.

Because said Bill of Exceptions, in setting out the same, does not conform to the requirements of Sec. 5, Chap. 75 of the Laws of 1899 of this Territory.

Because said Bill of Exceptions does not purport to include or incorporate therein all of the evidence which was given on the said trial or taken down by the said Court Stenographer, but only an abstract of the evidence which in the opinion of the Judge signing the said Bill of Exceptions, constituted the material evidence in the said cause.

Because the said abstract of the said evidence, so certified by the said Bill of Exceptions, contains merely the judgment and opinion of the Court trying said cause as to what was material.

Because the said defendants in error should have the right to have the whole of the said evidence brought before this Court on review in order that this Court may determine what part of the evidence is material and what part is not.

124 Because it does not appear in any way, nor is any reason stated in the said record, why it was impracticable to use the transcript of the stenographer's notes taken upon the said trial for the purpose of settling the said Bill of Exceptions.

And defendants in error particularly move to strike out from the record and Bill of Exceptions included in the record, all that part of the said Bill of Exceptions which is certified by the Judge to be an abstrract of the material evidence of witnesses, who were sworn and examined on the trial and whose evidence was taken down and transcribed by the stenographer and in which certificate the whole of the evidence of the said witnesses is not included, for the reason that the said Billof Exceptions in that regard and in that part does not conform to the requirements of Sec. 5, Chap. 75 of the Laws of 1899, of this Territory and does not purport to include and incorporate therein all of the evidence which was given by the witnesses on the said trial, or was taken down by the said Court Stenographer, but only an abstract of such evidence which in the opinion of the Judge signing the Bill of Exceptions, constituted the material evidence in the said cause and because said abstract is only the judgment and opinion of the Court as to what was material and because the defendants in error should have the right to have the whole of the said evidence before this Court in order that the Court may determine what was material and because it does not appear anywhere in the said Bill of Exceptions or otherwise, nor is any reason stated in the said record, why it was impracticable to use

the transcript of the stenographer's notes taken on the said trial, for the purposes of making up and settling said Bill of Exceptions.

And defendants in error further particularly move to strike out all of the other alleged and purported evidence in said cause
125 for the reason that the same, taken together with the said abstract does not purport to be all of the evidence which was given on the trial of said cause or which was taken down by the said stenographer, so that this Court, having the same before it, might determine which of the said evidence was material and which not.

And said defendants in error further move to strike out each and every part and parcel of the said Bill of Exceptions which upon the face thereof do not conform to the requirements and provisions of Sec. 5, Chap. 75 of the Laws of 1899 of this Territory.

(Signed) FRANK SPRINGER,
THOMAS B. CATRON,
CHAS. A. SPIESS,
Att'ys for Defendants in Error.

And afterwards, on to wit: at a regular term of the Supreme Court of the Territory of New Mexico, begun and held at Santa Fe, the seat of government, on the first Wednesday after the first Monday in January, A. D. 1904, on the first day of the said regular term, the same being Wednesday, the 6th day of January, A. D. 1904, the following among other proceedings were had and entered of record, *following* to wit:

No. 1021.

JOSEPH M. CUNNINGHAM, Trustee, ET AL., Plaintiffs in Error,
vs.
CHARLES SPRINGER ET AL., Defendants in Error.

Error to District Court, San Miguel County.

It is ordered by the court that the motion to strike out the bill of exceptions herein, be and the same hereby is set for hearing for Friday, January 8th, A. D., 1904.

126 And afterwards, on to wit: at the said regular term of the Supreme Court of the Territory of New Mexico, on the second day thereof, the same being Thursday, the 7th day of January A. D., 1904, the following among other proceedings were had and entered of record, viz:

No. 1021.

JOSEPH M. CUNNINGHAM, Trustee, ET AL., Plaintiffs in Error,
vs.
CHARLES SPRINGER ET AL., Defendants in Error.

Error to District Court, San Miguel County.

It is ordered by the court that this cause be, and the same hereby is reset for hearing for Wednesday, January 20th, 1904, and that the motion to strike out portions of the transcript in the said cause be reset for the same day.

And afterwards, on to wit, at the said regular term of the said Supreme Court of the Territory of New Mexico, on the fifth day thereof, the same being Thursday, the 12th day of January, A. D., 1904, the following among other proceedings were had and entered of record, as follows, to-wit:

No. 1021.

JOSEPH M. CUNNINGHAM, Trustee, ET AL., Plaintiffs in Error,
vs.
CHARLES SPRINGER ET AL., Defendants in Error.

Error to District Court, San Miguel County.

It is ordered by the court that this cause, and the motion herein to strike out the bill of exceptions, be, and the same hereby is re-set for hearing on Friday, January 22nd, 1904.

127 And afterwards, on to-wit, at the said regular term of the said Supreme Court, on the thirteenth day thereof, the same being Friday, the 22nd day of January, A. D., 1904, the following among other proceedings were had and entered of record, *following* to-wit:

No. 1021.

JOSEPH M. CUNNINGHAM, Trustee, ET AL., Plaintiffs in Error,
vs.
CHARLES SPRINGER ET AL., Defendants in Error.

Error to District Court, San Miguel County.

This cause coming on for hearing upon the motion of defendants in error to strike from the record herein, the bill of exceptions, is argued by C. A. Spiess, Esq., for defendants in error and Neill B. Field, Esq., for plaintiffs in error, and submitted to the court, and the court not being sufficiently advised in the premises, takes the same under advisement.

And afterwards, on to wit, at the said regular term of the said Supreme Court, on the fourteenth day thereof, the same being Saturday, January 23rd, A. D., 1904, the following among other proceedings, were had and entered of record, *following* to wit:

No. 1021.

JOSEPH M. CUNNINGHAM, Trustee, ET AL., Plaintiffs in Error,
vs.
CHARLES SPRINGER ET AL., Defendants in Error.

Error to District Court, San Miguel County.

This cause coming on for hearing upon the transcript of record, assignment of errors and briefs of counsel, is argued by Neill B. Field, Esq., for plaintiffs in error, and C. A. Spiess, Esq. and Thomas B. Catron, Esq., for defendants in error, and submitted to
128 the court, and the court not being sufficiently advised in the premises, takes the same under advisement.

It is hereby ordered by the court that the plaintiffs in error herein do have twenty days from this date to file additional brief, and that the defendants in error have twenty days thereafter to reply.

And afterwards, on to wit: at a regular term of the Supreme Court of the Territory of New Mexico, begun and held at Santa Fe, the seat of Government, on the first Wednesday after the First Monday in January, A. D., 1905, on the fourteenth day thereof, the same being Monday the 23rd day of Janary, A. D., 1905, the following among other proceedings were had and entered of record as follows, to wit:

No. 1021.

JOSEPH M. CUNNINGHAM, Trustee, ET AL., Plaintiffs in Error,
vs.
CHARLES SPRINGER ET AL., Defendants in Error.

Error to District Court, San Miguel County.

It is ordered by the court that this cause be, and the same hereby is set for re-hearing for Friday, the 24th day of February A. D., 1905.

And afterwards, on to wit: at the said regular term of the said Supreme Court, on the Seventeenth day thereof, the same being Friday, the 24th day of February, A. D., 1905, the following among other proceedings were had and entered of record, as follows, to-wit:

129 No. 1021.

JOSEPH M. CUNNINGHAM, Trustee, ET AL., Plaintiffs in Error,
vs.
CHARLES SPRINGER ET AL., Defendants in Error.

Error to District Court, San Miguel County.

This cause having come before the court on re-argument and coming on to be heard upon the transcript of record, assignment of errors and briefs of counse-, is argued by Neill B. Field, Esq., for plaintiffs in error and Charles A. Spiess, Esq., for defendants in error, and the argument herein not being yet concluded, this cause is hereby continued until tomorrow morning.

And Afterwards, on to-wit at the said regular term of the said Supreme Court, on the eighteenth day thereof, the same being Saturday, February 25th, 1905, the following among other proceedings were had and entered of record, *following* to-wit:—

No. 1021.

JOSEPH M. CUNNINGHAM, Trustee, ET AL., Plaintiffs in Error,
vs.
CHARLES SPRINGER ET AL., Defendants in Error.

Error to District Court, San Miguel County.

This cause again coming on to be heard upon the transcript of record, assignment of errors and briefs of counsel, is further argued by T. B. Catron, Esq. for defendants in error, and Neill B. Field, Esq. for plaintiffs in error, and submitted to the court, and the court not being sufficiently advised in the premises, takes the same under advisement.

And Afterwards, on to wit at the said regular term of the said Supreme Court of the Territory of New Mexico, on the twenty-fourth day thereof, the same being Friday, the 1st day of September,
130 A. D., 1905, the following among other proceedings were had and entered of record, *following* to-wit:—

No. 1021.

JOSEPH M. CUNNINGHAM, Trustee, ET AL., Plaintiffs in Error,
vs.
CHARLES SPRINGER ET AL., Defendants in Error.

Error to District Court, San Miguel County.

This cause having been argued by counsel, and submitted to and taken under advisement by the court upon a former day of the

present term, and the court being now sufficiently advised in the premises, announces its decision by Associate Justice McFie, Associate Justices Pope, Parker, Abbott and Mann, concurring, affirming the judgment of the court below, for reasons stated in the opinion of the court on file; It is therefore considered and adjudged by the court that the judgment of the District Court in and for the county of San Miguel, whence this cause came into this court, be and the same is hereby affirmed, and that in accordance therewith, It is ordered and adjudged by the court that the plaintiffs in error herein Joseph M. Cunningham, Trustee, Ida M. Jones and Andrieus A. Jones, take nothing by their said action, and that the respective defendants in error go hence without day. It is further ordered by the court that the said plaintiffs in error pay the costs in this behalf expended to be taxed for which let execution issue.

And Afterwards, on to-wit, on the first day of September, A. D., 1905, there was fi'ed in the office of the Clerk of the Supreme Court of the Territory of New Mexico an opinion by the court in the above entitled cause, which said opinion by the court was and is in words and figures following to wit:—

131 In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1905.

No. 1021.

JOSEPH M. CUNNINGHAM, Trustee, ET AL., Plaintiffs in Error,
vs.
CHARLES SPRINGER ET AL., Defendants in Error.

Error to District Court, San Miguel County.

Statement of the Case.

This is a suit brought to recover the value of legal services which it is alleged plaintiff in error, Andrieu A. Jones, rendered the defendants in error in an action of ejectment brought by the Maxwell Land Grant Company against John B. Dawson in the District Court of Colfax County, in which it is alleged, Ida May Jones has an interest and Joseph M. Cunningham is her trustee.

The complaint contained three counts, but each of them was founded upon plaintiffs in error's right to recover the reasonable value of the services rendered by plaintiff Jones, the amount claimed being seventy-five thousand dollars. The third count which is evidently the count upon which the trial proceeded, the evidence being applicable directly to this count, omitting the clause relating to the interest of Ida May Jones and Cunningham trustee, is as follows:—

"Plaintiffs for a third and further cause of action state that on to wit: The — day of ——, 1891, the said defendant John B. Dawson, was the owner and claimant of a large tract of valuable land situated in the County of Colfax, and Territory of New Mexico, of very great

value, to wit: The value of five hundred thousand ($500,000) dollars.

That thereafter, certain litigation and law suit of and concerning said land and the title thereof were commenced against
132 said defendant, John B. Dawson, by the Maxwell Land Grant Company. That thereafter, on or about the — day of ——, 1891, the said defendant, John B. Dawson made and entered into an agreement to convey, and thereafter did convey, to the said defendant Charles Springer, a one-half interest of all the said valuable lands as aforesaid, in consideration that the said Charles Springer should pay all costs and expenses of carrying on and conducting to a final determination the defense of said claims to said valuable lands set up and made by said Maxwell Land Grant Company.

That in pursuance to the said agreement so made and entered into between the said Dawson and the said Springer for the carrying on and defense of said litigations, the said defendant, Charles Springer, on behalf of himself, and the said John B. Dawson, made and entered into certain agreement with the plaintiff herein, Andrieus A. Jones, as an attorney and counsellor at law, whereby the said plaintiff, Andrieus A. Jones, agreed to conduct and manage for the defendants the said defense of said litigations, and for such services the plaintiff, Andrieus A. Jones, was to receive a reasonable compensation, and that thereafter, in pursuance of said agreement, the said Andrieus A. Jones, did take charge of, manage, conduct and control the said defense of said litigation to a successful issue, of which the said defendants had notice, and that the reasonable compensation therefor was and is the one-half of the value of the undivided one-half interest in said valuable lands, so set apart for the costs and expenses of conducting said defense. The net value of said one-half, plaintiffs allege, to be the sum of seventy-five thousand ($75,000) dollars. Plaintiffs state that the said plaintiff herein, Andrieus A. Jones, has duly performed all the conditions of said contract on his part to be performed, but that the defendants and each of them, have and has wholly failed to perform their part of said agreement to the damage of the plaintiffs in the sum of seventy-five thousand ($75,000) dollars, for which plaintiffs pray judgment and the costs of this suit."

133 To this complaint the defendants filed an answer, the first paragraph of which is a denial of each and every allegation of the complaint; the second paragraph alleges payment before the commencement of the action, and the third paragraph sets up the four year statute of limitation.

The plaintiffs replied to the second and third paragraphs, and upon the issues thus joined a jury trial was had and a verdict for defendants in error, was rendered.

Motion for a new trial being overruled, the review is sought in this court upon a writ of error.

Opinion of the Court.

McFIE, *J.*:

Before proceeding to the consideration of the assignments of error, it seems advisable to give attention to one contention of the defendants in error which seems to go to the merits of this case. If sustained, it would seem to dispose of the case, but, in any event, it will aid the court in the consideration of the specific errors assigned. It is insisted by the defendants in error, that the verdict of the jury was rendered upon conflicting evidence: that it was fairly submitted to the jury by the court in its instructions, and that where such is the case, this court will not disturb the verdict nor reverse the judgment based upon it. This court has repeatedly held, that where there is a conflict of evidence, it being the exclusive province of the jury to determine the weight and credibility of the testimony, the verdict will not be disturbed in the appellate court. Badeau *v.* Baca, 2 N. M., 194; Ty. *v.* Webb, 2 N. M., 147; Waldo *v.* Beckwith, 1 N. M., 97; Ty. *v.* Maxwell, 2 N. M., 250; Torlina *v.* Trorlich, 5 N. M., 148; Armijo *v.* Abeyta, 5 N. M., 533; U. S. *v.* De Amador, 6 N. M., 173; Ty. *v.* Hicks, 6 N. M. 596; Trujillo *v.* Territory 7 N. M., 43; A. T. & S. F. Ry. Co. *v.* Martin, 7 N. M., 158; Green *v.* Browne & Manzanares, 11 N. M., 658; Robinson *v.* Palatine Insurance Co., 11 N. M., 162; Schofield *v.* Territory, 9 N. M., 526.

134 That there was a decided conflict in the evidence is apparent. A synopsis of the evidence of plaintiff Jones and defendant Springer, the persons who entered into the agreement and the only witnesses who testified concerning its terms, as set forth in the brief of counsel for plaintiffs in error, is as follows:

"Jones' account of his employment by Springer may be sum-arized as follows:

' * * * * that on the tenth day of October, 1891, he was engaged in the practice of law at Las Vegas, in the Territory of New Mexico' and in that day 'the defendant, Charles Springer, came to his office and told him that the Maxwell Land Grant Company was going to bring, or had brought, a suit against John B. Dawson, for his ranch in Colfax County, and wanted him to represent Mr. Dawson in that litigation; that Jones acquiesced, and thereupon Spinger wanted to know what fee would be charged and Jones said, I do not know what would be a right fee. I do not know anything about the case or how much work would be required or the value of the property involved, and said to Springer, you know more about that than I do. Whatever you think is right will be satisfactory to me. Thereupon Springer asked Jones if five hundred dollars would be about right, and Jones replied, if you think that's fair, it will be satisfactory to me; that Jones did not know at that time that Charles Springer had any interest in the controversy and supposed that Springer was employing him to represent Mr. Dawson, and that Springer was a disinterested friend of both Dawson and himself; that Springer then said, well, we will fix the fee at five hundred dollars for the case in the District Court and in the Supeme Court of the Territory, and Springer thereupon gave Jones a check for one

hundred dollars on account of his fee; that nothing was said about the case in the Supreme Court of the United States or about a second trial or about a second appeal to the Supreme Court of the Territory; * * * *'"

135 "Springer's account of the same transaction is:

' * * * after the suit was brought, witness (Springer) visited Las Vegas, to employ counsel and determined to employ A. A. Jones if he could do so; that he was not personally acquainted with Mr. Jones and was introduced to him on the day when he first spoke to him about the Dawson case and told Mr. Jones something of the case; told him that the Maxwell Land Grant Company had brought a suit in ejectment against Mr. Dawson involving the title to his ranch in Colfax County; that he had an interest in the property and that he had to pay all the expenses of the litigation; that he had come to see if he could employ him; that Jones asked witness if he had employed or if he expected to employ anybody else; the witness told him he had not and had no intention of doing so; that he told Jones that the case would undoubtedly be bitterly fought by the Maxwell Land Grant Company and that they had, up to that time, never been defeated in a lawsuit; that the case would undoubtedly go to the Supreme Court of the United States and asked him what he would charge the witness to conduct the litigation; and Jones answered, I am willing to leave the matter entirely to you; that witnesses then said, I would like to have settled what your charges will be, and asked Jones to state what his charges would be, to which Jones replied that he did not care to do that; that the witness said, how would a fee of five hundred dollars do, to which Jones replied, that will be perfectly satisfactory, and the witness said, that is for the entire litigation; Mr. Jones after some hesitation said yes, I am satisfied with that; that witness told Jones that he had considerable other business, some of his own and some that he controlled, which would require the services of an Attorney and that if he undertook the Dawson case, witness would give him such business as he had in that line and get whatever business for him that witness could get on the outside; witness also said that he would himself assist in the case in every way possible and would get up all the maps and

136 plats and surveys and generally hunt up all the evidence in the case; that Jones made no inquiry with reference to the authority of witness to employ him in the case and all that was said on that subject was that witness had an interest in the property and had to pay the expenses of the litigation;' * * * "

From this testimony it is clear that there was a parol contract or agreement entered into by Jones and Springer and that this action was brought upon it. On page 2 of the brief of counsel for plaintiffs in error, is found an admission of this fact. *"The contract under which the services sued for were performed rests entirely in parol, and there is an astonishing, not to say appalling conflict between the parties who made it, as to its terms."* The complaint alleges that an agreement was entered into for the employment of Jones to conduct the defense in the litigation between the Maxwell Land Grant Company and Dawson in which Springer had a one-

half interest, and further alleges that the agreement was that Jones should receive for his services "reasonable compensation," or in effect, that the amount of compensation was not agreed upon. To this the defendants filed a general denial and plea of payment. The testimony above referred to discloses the fact, that the case as tried before the jury, was different from that made by the pleadings. Under the pleadings the issue was as to the terms of the contract in regard to compensation, the plaintiffs alleging that the amount of compensation was not agreed upon, but that Jones was to receive reasonable compensation for his services; while the defendants deny that the contract was as alleged by the plaintiffs and that defendants paid the plaintiffs in full before the suit was brought. Upon the trial, however, Jones admits, that five hundred dollars was agreed upon as his compensation for services in the litigation which he was employed to conduct, and Springer testifies that five hundred dollars was agreed upon as Jones' compensation. Both Jones and Springer therefore testify that there was a contract for the employ-
137 ment of Jones, and that the contract provided that Jones was to receive five hundred dollars for his services, but Jones and Springer differed as to the terms of the contract, in this; Jones testified that the contract was that he should only conduct the defense of the Dawson case in the District Court and the Supreme Court of the Territory, but that nothing was said about the case in the Supreme Court of the United States, or about a second appeal or trial in the Territorial Supreme Court, and further that Springer did not tell him he would give him other business. Springer on the contrary, testified, that Jones was employed to defend the title to Dawson's land in the litigation with the Maxwell Land Grant Co. and told Jones at the time he agreed to take the case, that the suit would be bitterly contested; that the Company had never lost a case and that the case would undoubtedly go to the Supreme Court of the United States; that witness said to Jones, "I would like to have settled what your charges will be, and asked Jones to state what his charges would be, to which Jones replied that he did not case to do that; that witness then said how would a fee of five hundred dollars do; to which Jones replied that will be perfectly satisfactory; that witness said, that is for the entire litigation, and Mr. Jones after some hesitation said yes, I am satisfied with that." Witness further testified that Jones never intimated any dissatisfaction on account of compensation, nor was any charge made in the agreement as to compensation. In another part of his testimony Jones testified that after the first trial of the suit, Springer said to him, "Of course, you cannot be expected to attend to this business for any five hundred dollars, you go ahead with it, we will see how we will come out, and when it is all over, you will be paid what is right." Jones further testified that on at least two other ocasions Springer promised to pay him 'a big cash fee' when the property was sold. Springer positively de-
nied that he ever made any of those statements or promises
138 to Jones at any time. There were no other witnesses who testified concerning this contract or its terms, nor as to any modification thereof.

It appears further from the testimony of these witnesses, that Jones was admitted — in May, 1888, and the contract between him and Springer was entered into in October, 1891, or about three and a half years after he was admitted to the bar; that Jones was employed in other litigation by or through Mr. Springer from which he received nine thousand dollars, Mr. Springer placing the amount at $15,000; that the suit of the Maxwell Land Grant Company *vs.* Dawson was tried twice in the district court, twice by the Supreme Court of the Territory, once by the Supreme Court of the United States, the final decision beinf in favor of Dawson. Springer testifies that he paid Jones Five hundred dollars for his fee, two hundred dollars for expenses to Washington, and one hundred dollars foa a lawyer of Washington City, and Jones does not deny that he received five hundred dollars. Jones testifies that his services were reasonable worth $75,000. Several expert witnesses were examined as to the value of the property involved in the Dawson suit, variously estimating the value of the land to be from $40,000 to $450,000, and the services, in the absence of contract, at from $2,000 to $125,000. The above is substantially all of the evidence as shown by the summary thereof in the transcript, the original evidence is not before the court. It is manifest from this evidence, that the question for the jury to determine was not whether or not there was a parol contract entered into between the parties, nor whether or not valuable services were rendered under it, as these facts were admitted, but the question for the jury was as to the terms of the contract with reference to compensation, that is to say, did the contract provide that this Jones should receive reasonable compensation for his services as contended by the plaintiffs? or did the contract provide that Jones should re-
139 ceive $500 in full for services rendered under the contract, as contended by the defendants? 2nd. Was such contract subsequently modified? and 3rd. Was plaintiff paid in full before suit? These were purely issues of fact for the sole determination of the jury, and, there being a conflict of evidence, which counsel for plaintiffs in error designate as 'astonishing, not to say appalling' and which the counsel for defendants in error refer to as a 'hop-less conflict,' if the issues were fairly submitted to the jury by the court in the instructions, the verdict of the jury should not be disturbed. It was the exclusive privilege and also the duty of the jury to determine the weight to be given the evidence, and to pass upon the credibility of the witnesses. This, it must be presumed, was done, and resulted in a verdict in favor of the defendants. Obviously, this verdict means that the jury concluded that the defendants' contention was correct, that under the contract Jones was only entitled to five hundred dollars for his services; that the full amount had been paid before suit and that there had not been any subsequent modification of the terms of the contract, enabling Jones to recover more, upon a *quantum meruit*. If the jury believed the testimony of Springer in preference to that of Jones, they had a perfect right to do so, and the necessary result of such belief would be the verdict rendered.

This view of the case brings it clearly within the law as laid down

in the decisions of this court, above cited, unless the court failed to present the case fairly to the jury in its instructions.

The record shows, that of the 16 paragraphs of the court's charge, but a single paragraph—No. 13—is objected to as erroneous, by counsel for plaintiffs in error, either in their briefs or oral argument. The fifteen paragraphs of the court's charge, to which no objection was made, are not before the court for consideration, except for the purpose of ascertaining whether or not the case
140 was fairly submitted to the jury, by them. An examination of them shows, the issues were presented in a fair and impartial manner, so acceptably indeed, that no assignments of error are predicated upon them.

Paragraph No. 13 relates solely to the burden of proof, and being the only paragraph upon which error is assigned, it follows, that all of the other issues were submitted to the jury by the court in a manner entirely acceptable to the parties to the suit, and the cause was argued by counsel before the jury upon those instructions. As to paragraph No. 13, the record discloses the following facts:

"And thereafter the argument of counsel to the jury proceeded, and after the argument of one counsel on behalf of the plaintiffs and of both counsel on behalf of the defendants had been concluded, and before the beginning of the closing argument by Mr. Field on behalf of the plaintiffs, the court said to the jury:

'GENTLEMEN OF THE JURY:

'In the thirteenth instruction given you by the court, in which I spoke about the burden of proof, I have concluded to modify that instruction by striking out the words *material fact,* in the second line and inserting in lieu thereof, the word *issue;* and also in the same line the word *fact* and insert in lieu the word *issue,* and in the fifth line strike out the words *material fact* and put in the word *issue.* So the instruction will read, gentlemen, as follows:

'In case the burden of proof is on the plaintiffs as to every issue, except that of payment, as to which issue the burden of proof is upon the defendants. In order to entitle the plaintiffs to recover in this case they must establish every such issue with the exception aforesaid by a preponderance of the evidence; and if you find that the evidence bearing upon the plaintiffs' case is evenly balanced, or that it preponderates in favor of the defendants, then the plaintiffs cannot recover, and you should find for the defendants.
141 'Now, gentlemen, I will withdraw instruction No. 13, given to you before and insert and give you this amended instruction instead.'

The court read the foregoing amended instruction from a carbon copy of the original charge in which the words above mentioned as stricken out were crossed out with a pencil, and the words mentioned as having been inserted were written in with pencil. After the foregoing amended instruction was read to the jury, Mr. Field, of counsel for plaintiff, said to the court:

(Mr. FIELD to the Court:) As thus modified, I think the charge is absolutely without objection, if the court please.

The amendment to the thirteenth instruction by the court to the jury, as thus made was also taken down by the court stenographer and transcribed by the said stenographer from his notes of the proceedings of the trial and attached to the original charge on file, after the verdict of the jury had been returned."

The modification made by the court in paragraph No. 13 as originally given, was to substitute in writing the word "issue" for the word "fact" or "material fact." This modification was made in conformity to the views of counsel for plaintiffs in error. There was no objection made to the method of modification, nor to its being read to the jury from a carbon copy. On the contrary, after all this was done counsel for plaintiffs in error said, "As thus modified, I think the charge is absolutely without objection."

These proceedings took place in open court, and prior to the closing argument in behalf of plaintiffs in error, so as to enable counsel to present the cause to the jury upon the modified instruction. It is difficult to understand, therefore, how the jury could have been deceived or misled in that regard to the prejudice of plaintiffs in error. Counsel allege as error, that the modified instruction was not taken to the jury room, by the jury. The record does not seem to warrant this assignment. The record does not affirmatively
142 show that any of the instructions were taken by the jury to their room, and yet, the instruction was modified, read to the jury, and the court had notified the jury that the original No. 13 had been withdrawn, before the jury retired. If counsel base this assignment upon the record statement as to what the stenographer did, it is clearly insufficient. The statement is, "The amendment to the thirteenth instruction by the court to the jury, as thus made was also taken down by the court stenographer and transcribed by said court stenographer from his notes of the proceedings of the trial, and attached to the original charge on file, after the verdict of the jury had been returned." The substance of the statement is, that the stenographer took down the court's modification, and having transcribed his notes of paragraph 13, as modified, attached the same to the charge of the court on file, after the verdict had been rendered. But the record shows that the Chief Justice made the modification desired upon a carbon copy of the original paragraph 13 and read the same to the jury. It is true the record is silent as to actual handing of the charge, or any part of it to the jury, but it will be presumed that, that which should have been done, was done, in the absence of proof to the contrary or objection upon that ground. The stenographer may have done as stated, and yet, the charge and the modified carbon copy which had been substituted for the original paragraph 13, may have been before the jury while they were deliberating upon their verdict. The court seems to have done all in his power to correct paragraph 13 in accordance with the views of counsel for plaintiff in error, and to the method adopted, that the original paragraph was withdrawn and the amended one given then there was no objection at the time. If the court did not actually take the original paragraph from the jury, upon giving them the modified substitute, so that both were before

them, it is inconceivable that the jury would be deceived or mislead as to which they should consider. The phraze "original charge on file" to which the stenographer attached his transcript, does not necessarily mean paragraph 13, as it may, and apparently
143 does refer to the entire charge of the court. Taking the position that paragraph 13 was not modified and was not before the jury, counsel for plaintiff in error make three assignments of error upon it: No. 9, that it was an oral modification, No. 10, that the original paragraph was not modified in writing as attempted, and No. 11, that part of the charge was not in writing. In our opinion these assignments are not well taken for the reasons above stated. Counsel for plaintiffs in error still insisting that paragraph 13, as modified, was not before the jury, refer the court to sub-section 128 of the Code, wherein it is provided:

"*The court,* may of its own motion, *give like instructions in writing, and all instructions shall be given by the court before argument and shall be carried by the jury to their room for their guidance to a correct verdict according to the law and the evidence.*"

This precise language is found in section 2188 R. S. Missouri 1889, from which it was undoubtedly taken and also in former statutes. In adopting the Missouri statute, this court has held, that we also adopt the construction which the courts of that state put upon it. In the case of Grove *v.* City of Kansas, 75 Mo., 672, the Supreme Court of Missouri construing a provision similar to this, held that where no objection is raised on account of the failure of the jury to *the* the instructions with them, there is no ground for a new trial.

As to the necessity for seasonable objection, this court in the case of Neher *v.* Armijo, 11 N. M. 67, said:—

"It is fundamental that errors complained of must be objected to and exceptions saved, or they will be disregarded in an appellate court. * * * In so holding we are not *in*mindful of sub-section 119, section 2685, Com. Laws, 1897, which dispenses with the formal exceptions, but in no sense dispenses with objections in order
144 to preserve the error complained of. We simply hold that objections must be preserved according to the form of law to be available in this court."

And on page 519-20 this court further says in discussing the necessity for objection under section 897, L. 1897:

"Can it be pretended that immaterial, invited or waived errors are to be passed upon? We think not. An error of the trial court ceases to be such in the appellate court if the same is immaterial, invited or waived. We are confirmed in this conclusion by the persistent ruling of this court ever since this statute was passed in 1889, to the effect that only such errors as are properly saved and presented will be considered."

Objection was made in the motion for new trial; this was also done in the case from Missouri above referred to, but the court held that this was too late. It would seem to be a dangerous precedent to hold that a new trial should be granted or reversal had, where the jury through carelessness, inadvertence or otherwise fails to

take the court's instructions with them, after the same have been read to them. Error is assigned upon the giving of instruction 13 in the original form, in the use of the word *fact* instead of the word *issue*, as used in the modified form which counsel concede to be a correct statement of the law. This assignment is made upon the theory that the court did not properly modify the charge. We cannot concede the correctness of the position of counsel for plaintiffs in error, even if the modification was ineffectual. While the word *issue* may, in many instances, be more comprehensive than the word *fact*, under the pleadings in this case there is no such difference as would be prejudicial to plaintiffs in error, and constitute reversible error. The original instruction was:

"In this case the burden of proof is upon plaintiffs as to every material fact, except that of payment, as to which fact the burden of proof is upon the defendants. In order to entitle the plaintiffs to recover in this case they must establish every such material fact with the exception aforesaid by a preponderance of *of* the evi-
145 dence; and if you find that the evidence bearing upon the plaintiffs' case is evenly balanced or that it preponderates in favor of the defendants, then the plaintiffs cannot recover, and you should find for the defendants."

If the plea of payment had been the sole plea, there would be force in the contention of plaintiffs in error. Being an affirmative defense, the plaintiffs' case would have been confessed, and the onus would be upon the defendants in error to avoid the effect of this by proving payment in full. Or, if the defendants in error had also pleaded a general denial, but before trial had withdrawn it electing to stand upon the plea of payment, the defendants would then have assumed the affirmative, and the burden of proof being cast upon them, would have been entitled to have opened and closed the case. Cyc. Vo-. 16 pages 926, 929, and cases cited; American Digest, Vol. 46, page 738. But this is not the rule when a general denial is also pleaded. Where a defendant denies an allegation material to the plaintiff's case, the burden is on the plaintiff to establish its truth. Cyc. Vol. 16, 929, note 23.

Pomeroy on Code Remedies, section 724, says:—

"When a denial is pleaded in connection with a defense of new matter, the admission in the one can never be used to destroy the effect of the other. The concession of a defense by way of confession and avoidance do not obviate the necessity of proving the averments contradictory by the denial. This rule is universal."

In this case there is a dispute as to the terms of a parol contract. Each party claims the terms to have been different and so testify. In such case the general issue casts the burden of proof upon the plaintiff to establish his version of the contract, and further, to show that some amount is due him under it.

In the case of Garretson *v.* Betsar, 57 Iowa, 470, the Supreme Court of Iowa said:

The defendant simply sets up the agreement as he under-
146 stood it and alleges he had complied with it. It was not incumbent on the defendant, in order to defeat plaintiff's

claim, to prove this agreement and compliance with it. The substantial issue, and which involves the merits of the case, is whether there is due the plaintiff $300 on the contract to purchase. The plaintiff alleges that sum due. The defendant denies that sum or any other amount due. * * * The burden of proof is on the plaintiff to establish that fact that is, that some amount was due."

The parties were in direct conflict as to the fact, and the burden of proof was upon the plaintiff. Dittle *v.* Dimick, 143 N. Y. 552.

Under the general issue, or a general denial, the plaintiff has the burden of proving his claim. And in case the defendant denies mearely, or answere so as not to admit, the plaintiff has the burden through the trial as to every part of the case. Selma, etc. Ry. Co. *vs.* U. S., 139 U. S., 560; Heinman *v.* Hurd, 62 N. Y. 456; Murphy *v.* Harris, 77 Cal., 104; Knapp *v.* Roche, 94 N. Y. 332; Brown *v.* Forbes, 6 Dak. 273; Hun *v.* Van Dyke, 26 Hun. 567; Van Giesen *vs.* Van Giesen *et al.*, 10 N. Y. 316; Quin, Adm. *vs.* Lloyd, 41 N. Y. 349; Grews *v.* Bleakley, 16 Ill. 21; Sinnamon *v.* Melborne, 4 Greene (Iowa), 309; Wheatley *v.* Phepls, 2 Dana (Ky.), 302; Miller *v.* Brooks, 4 Smed. & M. (Miss.), 175; Somerville *v.* Stewart, 48 N. J. L., 117.

The defendants in error did not set up a special contract, but only a general denial that the contract was as the plaintiff alleged. In our opinion, payment could have been proven under the general denial, as it devolved upon the plaintiffs in error, to establish a sum due as they allege a breach by failure to pay. Wetmore *vs.* San Francisco, 44 Cala. 300; Mickle *vs.* Hinton, 92 Cala. 597-8; Fresch *v.* Caler, 21 Cala. 74-5.

The first and second paragraphs of sub-section 2685 of our Code, are identical with section 437 Civil Code of California, hence the above cited cases seem to be in point here. But the plea of
147 payment, pleade- as it was after a general denial, could not under any circumstances cast upon the defendants in error the burden except as to the *fact* of payment as stated in the original instruction 13.

Counsel for plaintiffs in error, in their brief, contending that the burden was cast upon the defendants in error under the plea of payment, insist that, "under the issue as made up in this case they could show this in either of two ways; First, by showing a special contract for an agreed price, and the payment of that price; or Second, by showing that they had paid the reasonable value of the services rendered. In either event it was incumbent upon them to show affirmatively all the facts necessary to establish their plea, and that too, by a preponderance of the evidence."

We do not so understand the law, unless the plea of payment was pleaded alone, or in the absence of a general denial. Plaintiffs in error assert that the burden of proof was on the defendants in error to show "a special contract for an agreed price, and the payment of that price." But under the general issue the burden was on the plaintiffs in error to prove the contract alleged and the amount due under it, the single fact of payment being left to the defendants in error, if, indeed, that was required of them. There-

fore, this instruction was not prejudicial to the plaintiffs in error even in its original form and ought not to work a reversal of the cause.

Error is assigned upon the refusal of the court to give two instructions requested by the plaintiffs in error.

The first was as follows:

"If the jury believe from the evidence that the plaintiff, A. A. Jones, agreed with the defendant, Charles Springer, to defend the case of the Maxwell Land Grant Company *vs.* John B. Dawson, for a fee of five hundred dollars, and that thereafter and before the rendition of all the services agreed to *to* be rendered by said
148 Jones, in said cause, the said Springer said to the said Jones," "You cannot be expected to attend to this business for any five hundred dollars; go on with the case and we will see how we come out, and after it is all over, you will be paid what is right," or words to that effect, and such proposition was accepted and acted on by Jones then the plaintiffs in this case are entitled to recover for the services of said Jones in said case whatever the same may be reasonably worth, as shown by the evidence in this case."

Evidently the court refused this instruction upon the ground that the court had substantially given the same. The Court gave the following charge upon that branch of the case:

4.

"Plaintiffs admit that there was a contract made at the time of Mr. Jones' employment in said case fixing the amount of his compensation at five hundred dollars for the trial of the cause in the District Court and Supreme Court of the Territory, and that three hundred dollars was paid to plaintiff Jones, under said contract, but they deny that said contract covered any services of Jones in the Supreme Court of the United States, or when said cause came back for trial to the District Court and Supreme Court of the Territory for the second trial."

5.

"Plaintiffs claim, however, that the original contract in relation to the services of A. A. Jones, was modified by a subsequent agreement made with the defendant Charles Springer to the effect that his compensation was not to be limited to the five hundred dollars originally fixed, but that he should go on with the litigation, see how it came out, and then Charles Springer would do what was right and after the property should be sold he would pay said Jones a big cash fee."

149 8.

"If the jury believe from the evidence that the original contract in relation to Mr. Jones' compensation was afterwards modified so that such compensation was not to be limited to the $500.00 agreed upon, then you should find for the plaintiffs in such sum as you believe from the evidence to be a reasonable value of the services of Jones, less whatever sum may have been paid."

tion requested. Counsel objected to the clause of the 5th paragraph

This par of the court's charge substantially covered the instruc- as to the payment of a "big cash fee," as calculated to mislead the jury into the belief that both of these statements were made in the same conversation. Jones testified that Springer made both of these statements and each of them were evidently intended to show a modification of the agreement and the court gave the plaintiffs in error the benefit of both. The jury were left to determine from their remembrance of the evidence, what the fact was as to the modification of the agreement. It is not error to refuse to give an instruction requested, where the same has been substantially given by the court. Beall *v.* Territory, 1st N. M., 507; Territory *v.* O'Donnell, 4 N. M., 196; Prior *v.* Cattle Co., 6 N. M., 44; Territory *v.* Baker, 4 N. M., 236; U. S. *v.* De Amador, 6 N. M., 173; Kirchner *v.* Laughlin, 6 N. M., 300; Daily *v.* Bernstein, 6 N. M., 380; Territory *v.* Edie, 6 N. M., 555; Territory *vs.* Trujillo, 7 N. M., 43; U. S. *v.* Vigil, 7 N. M. 296; Desserant *v.* Cerrillos Coal R. R. Co., 9 N. M., 495.

The second instruction which the court refused is as follows:—

"The court instructs the jury that the credibility of the witnesses is a question exclusively for the jury; and the law is, that where two witnesses testify directly opposite to each other, the jury are not bound to regard the weight of the evidence as evenly balanced.

The jury have a right to determine from the appearance of
150 the witnesses on the stand, their manner of testifying, their apparent candor and fairness; their apparent intelligence or lack of intelligence and from all of the other surrounding circumstances appearing on the trial, which witness is the more worthy of credit and to give credit accordingly."

Paragraphs 14 and 15 of the court's charge submitted to the jury every element of the requested instruction, except the limitation to two witnesses. At the time the court was called upon to deliver his charge the testimony of several witnesses was before the jury. The court could not say that the testimony of some of the other witnesses would not be considered by the jury as bearing upon the testimony of Jones and Springer, and hence, a general instruction as to the weight of the testimony and credibility of the witnesses was deemed proper. We are of the opinion that the charge of the court relating to the testimony of all the witnesses, was as favorable to the plaintiffs in error, as the case warranted, and while we see no objection to the giving of the instruction as requested, it was not error to refuse it as the general instruction directed the jury to consider the same elements in the testimony of all of the witnesses, including Jones and Springer, that the requested instruction would have required them to consider as to that of Jones and Springer.

The Court refused to take from the jury the testimony of witnesses John D. W. Veeder, R. E. Twitchell and Jeremiah Leahy as to the value of the services of Mr. Jones, and this ruling is assigned as error.

There is no room for doubt, that the jury found in favor of the defendants in error upon the ground that there was a special contract, by which Jones agreed to accept five hundred dollars in full of all

his services in the Dawson case; that there had not been a modification of the agreement, and that Springer had paid Jones in full.

151 This is conclusively shown in the fact that the lowest value fixed by Jones' services, in the absence of contract, by the witnesses on either side, was two thousand dollars, the highest being more than one hundred thousand dollars, and if the jury had found that there was no contract limiting Jones to the sum of five hundred dollars, and that the value of his services was provable, they could not have rendered the verdict they returned.

Whether or not there was a contract limiting Jones to a fee of five hundred dollars, was the first question for the jury to determine, and having found that there was such contract, all testimony as to the value of Jones' services and the value of the land involved in the Dawson suit became immaterial and not for the consideration of the jury. A ruling as to the admission or rejection of such evidence, in the face of the verdict of the jury would not constitute error, regardless of its character.

Where the subject matter of an exception becomes immaterial in the progress of the cause, it cannot be assigned as error, even though the ruling was erroneous. Creeleaf *v.* Birth, 5th Pet. 132; Philadelphia R. R. *vs.* Howard 13 How. 334; Brobst *v.* Brock, 10 Wall., 528; Wilson Co. *vs.* National Bank, 103 U. S., 777; Cavender *vs.* Cavender, 114 U. S., 471.

We do not wish to be understood as holding that the court committed error in the ruling upon this evidence in the court below, on the contrary, in our opinion, the rulings are sustained by the weight of authority, but, as the issue upon which this testimony was received, became wholly immaterial by the verdict of the jury, no prejudice could result to the plaintiffs in error, and error if committed, would be harmless.

What has been said above applies with equal force to the assignments regarding the rulings of the court as to the testimony of Mr. Twitchell as to the market value of coal lands, and as to that of Mr. Larrazola in regard to the professional standing of Mr. Jones, and we do not deem it necessary to further consider those assignments.

152 Counsel for plaintiffs in error moved the court to strike out that portion of the testimony of witnesses Twitchell, Veeder and Leahy, relative to the value of the property, upon the ground, that the testimony of such witnesses is based on an assumed value, and that this assumption is not based upon the evidence nor was it disclosed to the jury. The synopsis of the testimony in chief, shows, that all of these witnesses testified that they were familiar with the decisions rendered in the Dawson case, both in the Territorial Courts and Supreme Court of the United States; that they had examined the record and proceedings in the case, and that they could express an opinion as to the value of Jones' services, in the absence of contract. The record of the proceedings in the Dawson case, was introduced in evidence. It would appear from this, that their testimony was based upon the testimony in the case as to the value of Jones' services. Counsel in their brief state that

the hypothetical question propounded on behalf of the defendants in error, to these witnesses, omitted the element of value of the property in the Dawson suit. The transcript has not brought into this Court the hypothetical questions propounded in the court below, to these witnesses, and counsel's synopsis of the testimony in chief, does not include these questions. In the absence of the questions which the court has a right to examine in determining their contents we must assume that the questions were properly framed. This objection is urged especially as to the testimony of Mr. Twitchell, but Mr. Twitchell testified "My entire testimony has been given on the assumptions provided in the questions made to my by Mr. Spiess." That there were hypothetical questions propounded to these witnesses, is not questioned, it is only objected that one element, which counsel for plaintiffs in error deems essential, was omitted. This court cannot assume the correctness of Counsel's contention as to this omission, inasmuch as the hypothetical questions are not before the Court.

The action of the Court in denying the motion for a new trial, is also assigned as error.

153 Counsel for plaintiff- in error concede that, except in rare and unusual cases, motions for a new trial are addressed to the sound discretion of the court. It is contended, however, that the overruling of this motion was such a gross abuse of discretion as to amount to an error of law. Counsel urge that the court denied the motion under the belief that as a trial judge, he was bound by the verdict, even though there was an overwhelming preponderance of evidence against it. In disposing of the motion the court did not file a written opinion, and there is nothing in the record which discloses the views of the court in the disposition of this motion. There was, however, a direct conflict of evidence upon the issues submitted to the jury, which the jury reconsiled by its verdict, and we are unwilling to say that there was an abuse of discretion by the trial judge, as we deem the case one of those where the motion for a new trial is addressed to the sound discretion of the Court.

For the reasons above stated the judgment of the court below is affirmed. It is so ordered.

JOHN R. McFIE,
Associate Justice.

We concur:
WM. H. POPE, *A. J.*
FRANK W PARKER, *A. J.*
IRA A. ABBOTT, *A. J.*
EDWARD A. MANN, *A. J.*

Mills, C. J., having heard this case in the court below, did not participate in this decision.

Filed September 1st 905.

154 TERRITORY OF NEW MEXICO, *Supreme Court, ss:*

I, the undersigned, clerk of the Supreme Court of the Territory of New Mexico, do hereby certify that the above and foregoing one hundred and fifty-three (153) pages contain a full, true, perfect and complete copy of the record and proceedings, pleadings and opinion filed in the above entitled cause, which is hereby transmitted to the Supreme Court of the United States, in accordance with the writ of error hereto attached.

Witness my hand and the seal of the Supreme Court of the Territory of New Mexico, this the second day of November, A. D. 1905.

[Seal Supreme Court, Territory of New Mexico.]

JOSÉ D. SENA,
Clerk Supreme Court of New Mexico.

155 In the Supreme Court of the United States

JOSEPH M. CUNNINGHAM, Trustee, IDA MAY JONES, and ANDREIUS A. JONES, Plaintiffs in Error,

v.

CHARLES SPRINGER and JOHN B. DAWSON, Defendants in Error.

Assignment of Errors.

Come now the said plaintiffs in error, by their attorney, and show to the court that in the record, proceedings and judgment of the courts below, in the above entitled cause, there is manifest error, to the prejudice of the said plaintiffs in error, in this, to-wit:—

I.

The district court erred in refusing to withdraw from the consideration of the jury the opinion of the witness, John D. W. Veeder, as to the value of the services of A. A. Jones, and the supreme court of the Territory of New Mexico erred in affirming the action of the said district court in that behalf.

II.

The district court erred in refusing to withdraw from the consideration of the jury the opinion of the witness, R. E. Twitchell, as to the value of the services of A. A. Jones, and the supreme court of the Territory of New Mexico erred in affirming the action of the said district court in that behalf.

III.

The district court erred in refusing to withdraw from the consideration of the jury the opinion of the witness, Jeremiah Leahy, as to the value of the services of A. A. Jones, and the supreme court of the Territory of New Mexico erred in affirming the action of the said district court in that behalf.

IV.

The district court erred in refusing to withdraw from the consideration of the jury so much of the testimony of the witness, R. E. Twitchell, as relates to his opinion as to the value of coal lands in New Mexico, and the supreme court of the Territory of New Mexico erred in affirming the action of the said district court in that behalf.

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V.

The district court erred in refusing to give to the jury an instruction asked by plaintiffs, as follows:

"If the jury believe from the evidence that the plaintiff, A. A. Jones, agreed with the defendant, Charles Springer, to defend the case of the Maxwell Land Grant Company *vs.* John B. Dawson, for a fee of five hundred dollars, and that thereafter and before the rendition of all the services agreed to be rendered by said Jones in said cause, the said Springer said to the said Jones, 'You cannot be expected to attend to this business for any five hundred dollars; go on with the case, and we will see how we come out, and after it is all over, you will be paid what is right,' or words to that effect, and such proposition was accepted and acted on by said Jones, then the plaintiffs in this case are entitled to recover for the services of said Jones in said case whatever the same may be reasonably worth, as shown by the evidence in this case;"

and the supreme court of the Territory of New Mexico erred in affirming the action of the said district court in that behalf.

VI.

The district court erred in refusing to give to the jury an instruction asked by plaintiffs, as follows:

"The court instructs the jury that the credibility of the witnesses is a question exclusively for the jury; and the law is, that where two witnesses testify directly opposite to each other, the jury are not bound to regard the weight of the evidence as evenly balanced. The jury have a right to determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor and fairness; their apparent intelligence or lack of intelligence, and from all of the other surrounding circumstances appearing on the trial, which witness is the more worthy of credit and to give credit accordingly."

157

and the supreme court of the Territory of New Mexico erred in affirming the action of the said district court in that behalf.

VII.

The district court erred in giving to the jury paragraph 13 of the court's charge, as follows:

"In this case the burden of proof is upon the plaintiffs as to every material fact, except that of payment, as to which fact the burden of

proof is upon the defendants. In order to entitle the plaintiffs to recover in this case they must establish every such material fact with the exception aforesaid by a preponderance of the evidence; and if you find that the evidence bearing upon the plaintiffs' case is evenly balanced or that it preponderates in favor of the defendant, then the plaintiffs cannot recover, and you should find for the defendants."

and the supreme court of the Territory of New Mexico erred in affirming the action of the said district court in that behalf.

VIII.

The district court erred in giving to the jury an oral modification of said paragraph 13, and the supreme court of the Territory of New Mexico erred in affirming the action of the said district court in that behalf.

IX.

The district court erred in failing to modify in writing the original charge as read to the jury, in accordance with the oral modification attempted to be made by the court, and the supreme court of the Territory of New Mexico erred in affirming the action of the said district court in that behalf.

X.

The district court erred in giving to the jury a charge, a part of which was not in writing, within the meaning of the require-
158 ment of the statutes of this Territory, and the supreme court of the Territory of New Mexico erred in affirming the action of the said district court in that behalf.

XI.

The supreme court of the Territory of New Mexico erred in affirming the judgment of the district court.

Wherefore plaintiffs in error pray that the said errors may be corrected, that the judgment of the said supreme court of the Territory of New Mexico, and the judgment of the said district court, may be respectively reversed, vacated and annulled, and the plaintiffs in error may be restored to all things which they have lost by reason thereof.

NEILL B. FIELD,
Attorney for Plaintiffs in Error.

159 [Endorsed:] No. —. In the Supreme Court of the United States Joseph M. Cunningham, Trustee, *et al.*, Pl'ffs in Error, *vs.* Charles Springer *et al.*, Def'ts in Error. Assignment of errors. Neill B. Field, Albuquerque, N. M., Attorney for —— ——.

Endorsed on cover: File No. 19,960. New Mexico T. Supreme Court. Term No. 146. Joseph M. Cunningham, trustee, Ida May Jones, and Andrieus A. Jones, plaintiffs in error, *vs.* Charles Springer and John B. Dawson. Filed November 9th, 1905. File No. 19,960.

FILE COPY.

BRIEF OF PLAINTIFFS IN ERROR

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906

No. 146

Office Supreme Court, U. S.
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JOSEPH M. CUNNINGHAM, TRUSTEE; IDA MAY JONES, AND ANDRIEUS A. JONES PLAINTIFFS IN ERROR,

vs.

CHARLES SPRINGER AND JOHN B. DAWSON.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

NEILL B. FIELD,
Albuquerque, N. M.,
Counsel for Plaintiffs in Error.

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IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

BRIEF OF PLAINTIFFS IN ERROR

STATEMENT OF THE CASE

This is a suit by Joseph M. Cunningham, Trustee, Ida May Jones and Andrieus A. Jones against Charles Springer and John B. Dawson to recover the reasonable value of services rendered by the plaintiff in error A. A. Jones, as an attorney at law, in the defense of a certain action of ejectment brought by the Maxwell Land Grant Company against J. B. Dawson in the district court of Colfax county, New Mexico.

Cunningham, as trustee, and Ida May Jones are made parties, because Ida May Jones, formerly the wife of A. A. Jones, is interested in the recovery under an agreement for the division of the community property of the spouses after divorce,

Cunningham being trustee under that agreement.

The complaint was in three counts. The first count alleged the employment of A. A. Jones, as an attorney at law, by the defendants in error, in and about the defense of certain litigations and suits at law brought and to be brought of and concerning a large tract of land in the county of Colfax, New Mexico, and an agreement on the part of his employers to pay the reasonable value of his services, which reasonable value was alleged to be seventy-five thousand dollars ($75,000.00), and that no part of said sum had been paid. The second count alleged that Springer and Dawson were justly indebted to plaintiffs in the sum of seventy-five thousand dollars ($75,000.00) for the labor, services, care and diligence of A. A. Jones as an attorney and counsellor at law by him before that time done, performed and bestowed in and about the business of the defendants at their request; a promise by the defendants to pay the said sum of seventy-five thousand dollars ($75,000.00), and a breach of that promise. The third count alleged that Dawson was the owner and claimant of a large tract of land in Colfax county of the value of five hundred thousand dollars ($500,000.00); that certain litigation and law suits of and concerning the land and the title thereto were commenced against Dawson by the Maxwell Land Grant Company, and thereupon Dawson made and entered into an agreement to convey, and thereafter did convey to Springer the one-half interest of all said valuable land as aforesaid, in consideration that Springer should pay all costs and expenses of carrying on and conducting to a final determination the defense of said claims to said valuable lands set up and made by said Maxwell Land Grant Company; that in pursuance of said agreement made between Dawson and Springer, Springer, on behalf of himself and Dawson, made an agreement with the plaintiff A. A. Jones, whereby Jones agreed to conduct and manage for the defendant the defense of said litigation, and for such services Jones was to receive a reasonable compensation; that Jones performed the services; that the same are rea-

sonably worth seventy-five thousand dollars ($75,000.00) and have not been paid for.

The defendants answered jointly and set up three defenses as follows:

> "1. Now come the defendants in the above entitled cause and for answer to the complaint of the plaintiffs therein deny each and every allegation in said complaint contained.
>
> "2. And for further answer to said complaint defendants say: That before the commencement of this action they paid the demand for the recovery of which this action is brought.
>
> "3. And for a further answer to said complaint defendants say that this action was not commenced within four years from the time the cause of action therein accrued." (*Transcript, page 7.*)

To the second and third paragraphs of the answer a reply was filed. Upon these issues the case was tried by a jury who returned a verdict for defendants in error. A motion for a new trial having been filed and overruled, the case was taken for review to the supreme court of the Territory, and the judgment of the district court having been there affirmed, this writ of error was sued out to review the judgment of affirmance.

The contract of employment rested entirely in parol, and there were no witnesses to it except A. A. Jones and Charles Springer. Jones' account of his employment by Springer may be summarized as follows:

> " . . That on the tenth day of October, 1891, he was engaged in the practice of law at Las Vegas, in the Territory of New Mexico", and on that day "the defendant, Charles Springer, came to his office and told him that the Maxwell Land Grant Company was going to bring, or had brought, a suit against John B. Dawson, for his ranch in Colfax county, and wanted him to represent Mr. Dawson in that litigation; that Jones acquiesced, and thereupon Springer wanted to know what fee would be charged and Jones said, I do not know what would be a right fee. I do not know anything about the case or how much work would be required or the value of the property involved, and said to Springer, you know more about that than I do. Whatever you think is right will be sat-

isfactory to me. Thereupon Springer asked Jones if five hundred dollars would be about right, and Jones replied, if you think that's fair, it will be satisfactory to me; that Jones did not know at that time that Charles Springer had any interest in the controversy and supposed that Springer was employing him to represent Mr. Dawson, and that Springer was a disinterested friend of both Dawson and himself; that Springer then said, well, we will fix the fee at five hundred dollars for the case in the district court and in the supreme court of the Territory, and Springer thereupon gave Jones a check for one hundred dollars on account of his fee; that nothing was said about the case in the supreme court of the United States or about a second trial or about a second appeal to the supreme court of the Territory;" . . (*Transcript* 28.)

Springer's account of the same transaction is:

" . . . after the suit was brought, witness (Springer) visited Las Vegas to employ counsel and determined to employ A. A. Jones if he could do so; that he was not personally acquainted with Mr. Jones, and was introduced to him on the day when he first spoke to him about the Dawson case, and told Mr. Jones something of the case; told him that the Maxwell Land Grant Company had brought a suit in ejectment against Mr. Dawson involving the title to his ranch in Colfax county; that he had an interest in the property and that he had to pay all the expenses of the litigation; that he had come to see if he could employ him; that Jones asked witness if he had employed or if he expected to employ anybody else; the witness told him he had not and had no intention of doing so; that he told Jones that the case would undoubtedly be bitterly fought by the Maxwell Land Grant Company and that they had, up to that time, never been defeated in a law suit; that the case would undoubtedly go to the Supreme Court of the United States and asked him what he would charge the witness to conduct the litigation; and Jones answered I am willing to leave the matter entirely to you; that witness then said, I would like to have settled what your charges will be and asked Jones to state what his charge would be, to which Jones replied that he did not care to do that; that the witness said how would a fee of five hundred dollars do, to which Jones replied that will be perfectly satisfactory and the witness said that is for the entire litigation; Mr. Jones after some hesitation said yes, I am satisfied with that; that witness told

> Jones that he had considerable other business, some of his own and some that he controlled, which would require the services of an attorney and that if he undertook the Dawson case, witness would give him such business as he had in that line and get whatever business for him that witness could get on the outside; witness also said that he would himself assist in the case in every way possible and would get up all maps and plats and surveys and generally hunt up all the evidence in the case; that Jones made no inquiry with reference to the authority of witness to employ him in the case and all that was said on that subject was that witness had an interest in the property and had to pay the expenses of the litigation;" . . . (*Transcript* 39.)

A number of lawyers were called by the respective parties to testify as to the reasonable value of Mr. Jones' services. The witnesses on behalf of plaintiffs fixed such value at from seventy-five thousand dollars ($75,000.00) to one hundred and twenty-five thousand dollars ($125,000.00), while the witnesses on behalf of defendants in error varied from two thousand dollars ($2,000.00) to forty thousand dollars ($40,000.00) in their estimate of the value. It is insisted that error was committed by the trial court in refusing to strike out some of the testimony of the witnesses for defendants in error on this point. The case of the witness Veeder, as well perhaps as any other, illustrates this point, and we here set forth all that is shown by the bill of exceptions with relation to his testimony:

> "John D. Veeder, witness on behalf of the defendants, was sworn and examined and his testimony tended to show that he is an attorney at law, forty-six years of age and resides in Las Vegas, where he commenced the practice of law in 1882, that from that time on he has resided in Las Vegas and practiced law throughout the Territory in the District Court of the Territory, in the Supreme Court of the Territory and in the court of private land claims in the Territory and Texas and in the United States Supreme Court; that he is acquainted with the decision of the Supreme Court of the Territory and the Supreme Court of the United States in the case of the

Maxwell Land Grant Company vs. John B. Dawson; that he had been present during the trial of this case and heard the testimony of the plaintiff, A. A. Jones, and has examined the record which was used in the Supreme Court of the Territory and also the record which was used in the Supreme Court of the United States, and copies of briefs used by both sides in those courts and from his knowledge of that case derived from sources mentioned, witness can give an opinion as to the value of the services of A. A. Jones therein, supposing that there was no counsel (contract) in existence, fixing the value of such services; assuming the area in dispute to be about twenty-three thousand acres, a fair and reasonable fee for the services of Mr. Jones in the ejectment suit would be the sum of not more than five thousand dollars which should include all traveling expenses in connection with the case.

"On cross-examination the testimony of the witness tended to show that he had assumed what he described as a middle ground on the value of the property in controversy in the ejectment suit, but he did not disclose to the jury and was not asked to disclose to the jury what he meant by taking a middle ground on the value of the property in controversy nor what value he assumed for the property in making his estimate as to the value of Mr. Jones' services.

"The plaintiffs, by counsel, moved the court to strike out so much of the testimony of the witness, John D. Veeder, as expressed his opinion as to the value of the legal services of the plaintiff, A. A. Jones, in the case of the Maxwell Land Grant Company vs. John B. Dawson, because it affirmatively appears from the testimony of the witness that his opinion as to the value of the services of A. A. Jones is based upon an assumption as to the value of the land in controversy in that suit, which assumption of value is not disclosed to the jury and is not based upon the evidence in the case; but the court overruled the said motion to which the plaintiffs then and there excepted and still except." (*Transcript, pages* 43-44.)

The supreme court of New Mexico in passing on these questions evidently misapprehended our contention, and there is more than an intimation in the opinion of that court that the bill of exceptions was inadequate properly to present them.

but we submit that, properly understood, the errors are fully disclosed by the record. We made and make no objection to the form of question propounded to these expert witnesses. Our contention is, that when it appeared on cross-examination that a witness testifying as an expert was withholding from the jury facts which materially influenced his opinion, such opinion at once became inadmissible, and that we had a right to move to have it stricken out, and we were not bound to go on and make his opinion competent by causing him to disclose to the jury what had not been disclosed on direct examination.

At the close of the evidence the court gave to the jury a charge in sixteen paragraphs, to only one of which (Paragraph 13) was exception taken. Paragraph 13 is as follows:

> "In this case the burden of proof is upon the plaintiffs as to every material fact, except that of payment, as to which fact the burden of proof is upon the defendants. In order to entitle the plaintiffs to recover in this case they must establish every such material fact with the exception aforesaid by a preponderance of the evidence; and if you find that the evidence bearing upon the plaintiffs case is evenly balanced or that it preponderates in favor of the defendant, then the plaintiffs cannot recover, and you should find for the defendants." (*Transcript, page* 65.)

And the exception taken thereto is as follows:

> "To the action of the court in giving to the jury the propositions contained in paragraph 13 of the foregoing charge, the plaintiffs by their counsel, then and there objected, for the reason that the court therein fails to tell the jury what are the material facts in the case, and leaves to the determination of the jury the question of the materiality of each and every fact in evidence, and because it erroneously assumes that the defense of payment set up in the answer involves a single fact and not several facts, and fails to tell the jury that on the issue of payment made by the pleadings, it devolves upon the defendants to show by a preponderance of the evidence that there was an agreement on the part of the plaintiff, A. A. Jones, to perform the services performed by him in the ejectment suit for a fixed sum, to-wit, five hundred dol-

lars, and that said sum of five hundred dollars had been paid prior to the institution of the suit, in order to maintain the plea of payment; and because it fails to tell the jury that there is no evidence from which they would be authorized to find that the defendants had, prior to the institution of the suit, paid to the plaintiffs or any of them the reasonable value of the services rendered by A. A. Jones in the said ejectment suit, but the court overruled the said objection, and gave the said charge, notwithstanding the said objection, to which action of the court the plaintiffs then and there excepted and still except." (*Transcript, page* 66.)

Before the argument was concluded the trial judge attempted to modify the 13th paragraph of the charge to meet this objection, and if such modification had been effectually made the objection would have been fully met. The supreme court of New Mexico held that the modification was effectually made, and also that the charge as originally given was correct. It is urged that the modification was not effectually made and that this fully appears from the bill of exceptions, the opinion of the suprem court of New Mexico to the contrary notwithstanding. The bill of exceptions recites:

"And thereafter the argument of counsel to the jury proceeded, and after the argument of one counsel on behalf of the plaintiffs and of both counsel on behalf of the defendants had been concluded, and before the beginning of the closing argument by Mr. Field on behalf of the plaintiffs, the court said to the jury:

" 'Gentlemen of the Jury:

" 'In the thirteenth instruction given you by the court in which I spoke about the burden of proof, I have concluded to modify that instruction by striking out the words *material fact*, in the second line and inserting in lieu thereof, the word *issue;* and also in the same line the word *fact* and insert in lieu the word *issue*, and in the fifth line strike out the words *material fact* and put in the word *issue*.

" 'So the instruction will read, gentlemen, as follows:

" 'In this case the burden of proof is on the plaintiffs as to every issue, except that of payment, as to which issue the burden of proof is upon the defendants. In order to

entitle the plaintiffs to recover in this case they must establish every such issue with the exception aforesaid by a preponderance of the evidence; and if you find that the evidence bearing upon the plaintiffs' case is evenly balanced, or that it preponderates in favor of the defendants, then the plaintiffs cannot recover and you should find for the defendants.

"'Now, gentlemen, I will withdraw instruction No. 13 given to you before and insert and give this amended instruction instead.'

"The court read the foregoing amended instruction from a carbon copy of the original charge in which the words above mentioned as stricken out were crossed out with a pencil, and the words mentioned as having been inserted were written in with a pencil. After the foregoing amended instruction was read to the jury, Mr. Field, of counsel for plaintiff, said to the court:

"(Mr. Field to Court): As thus modified, I think the charge is absolutely without objection, if the court please.

"The amendment of the thirteenth instruction by the court to the jury, as thus made was also taken down by the court stenographer and transcribed by the said stenographer from his notes of the proceedings of the trial and attached to the original charge on file, after the verdict of the jury had been returned." (*Transcript, page 69.*)

The statutes of New Mexico require the charge of the court to be in writing, and that the charge shall be taken by the jury to the jury room when they retire to consult as to their verdict. Notwithstanding all that is said in the opinion of the supreme court of New Mexico on this point, we think it a demonstrable proposition that there is reversible error in this action of the trial court, unless paragraph thirteen of the charge as originally given was not open to the objection which was made to it. Two instructions were refused by the court, and the refusal was sustained by the supreme court of the Territory on the ground that they were fully covered by the charge. We think they were not covered by the charge, and that they were essential to a proper understanding of the case by the jury.

The plaintiffs in error have filed the following assignment of errors:

I.

The district court erred in refusing to withdraw from the consideration of the jury the opinion of the witness, John D. W. Veeder, as to the value of the services of A. A. Jones, and the supreme court of the Territory of New Mexico erred in affirming the action of the said district court in that behalf.

II.

The district court erred in refusing to withdraw from the consideration of the jury the opinion of the witness, R. E. Twitchell, as to the value of the services of A. A. Jones, and the supreme court of the Territory of New Mexico erred in affirming the action of the said district court in that behalf.

III.

The district court erred in refusing to withdraw from from the consideration of the jury the opinion of the witness, Jeremiah Leahy, as to the value of the services of A. A. Jones, and the supreme court of the Territory of New Mexico erred in affirming the action of the said district court in that behalf.

IV.

The district court erred in refusing to withdraw from the consideration of the jury so much of the testimony of the witness, R. E. Twitchell, as relates to his opinion as to the volue of coal lands in New Mexico, and the supreme court of the Territory of New Mexico erred in affirming the action of the said district court in that behalf.

V.

The district court erred in refusing to give to the jury an instruction asked by plaintiffs as follows:

"If the jury believe from the evidence that the plaintiff, A. A. Jones, agreed with the defendant, Charles Springer, to defend the case of the Maxwell Land Grant Company vs. John B. Dawson, for a fee of five hundred dollars, and that thereafter and before the rendition of all

the services agreed to be rendered by said Jones in said cause, the said Springer said to the said Jones, 'You can not be expected to attend to this business for any five hundred dollars; go on with the case, and we will see how we come out, and after it is all over you will be paid what is right', or words to that effect, and such proposition was accepted and acted on by said Jones, then the plaintiffs in this case are entitled to recover for the services of said Jones in said case whatever the same may be reasonably worth, as shown by the evidence in this case;" and the supreme court of the Territory of New Mexico erred in affirming the action of the said district court in that behalf.

VI.

The district court erred in refusing to give to the jury an instruction asked by plaintiffs, as follows:

"The court instructs the jury that the credibility of the witnesses is a question exclusively for the jury; and the law is, that where two witnesses testify directly opposite to each other, the jury are not bound to regard the weight of the evidence as evenly balanced. The jury have a right to determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor and fairness; their apparent intelligence or lack of intelligence, and from all of the other surrounding circumstances appearing on the trial, which witness is the more worthy of credit and to give credit accordingly." and the supreme court of the Territory of New Mexico erred in affirming the action of the said district court in that behalf.

VII.

The district court erred in giving to the jury paragraph 13 of the court's charge, as follows:

"In this case the burden of proof is upon the plaintiffs as to every material fact, except that of payment, as to which fact the burden of proof is upon the defendants. In order to entitle the plaintiffs to recover in this case, they must establish every such material fact with the exception aforesaid by a preponderance of the evidence; and if you find that the evidence bearing upon the plaintiffs' case is evenly balanced or that it preponderates in favor of the defendant, then the plaintiffs cannot recover and

you should find for the defendants";
and the supreme court of the Territory of New Mexico erred in affirming the action of the said district court in that behalf.

VIII.

The district court erred in giving to the jury an oral modification of said paragraph 13, and the supreme court of the Territory of New Mexico erred in affirming the action of the said district court in that behalf.

IX.

The district court erred in failing to modify in writing the original charge as read to the jury, in accordance with the oral modification attempted to be made by the court, and the supreme court of the Territory of New Mexico erred in affirming the action of the said district court in that behalf.

X.

The district court erred in giving to the jury a charge a part of which was not in writing, within the meaning of the requirement of the statutes of this Territory, and the supreme court of the Territory of New Mexico erred in affirming the action of the said district court in that behalf.

XI.

The supreme court of the Territory of New Mexico erred in affirming the judgment of the district court"

POINTS AND AUTHORITIES.

I.

THE OPINIONS OF THE WITNESSES, VEEDER, TWITCHELL AND LEAHY, AS TO THE VALUE OF JONES' SERVICES SHOULD HAVE BEEN WITHDRAWN FROM THE JURY.

As to these alleged errors, the supreme court New Mexico said in its opinion:

"There is no room for doubt that the jury found in

favor of the defendants in error upon the ground that there was a special contract, by which Jones agreed to accept five hundred dollars in full of all his services in the Dawson case; that there had not been a modification of the agreement, and that Springer had paid Jones in full. This is conclusively shown in the fact that the lowest value fixed by Jones' services, in the absence of contract, by the witnesses on either side, was two thousand dollars, the highest being more than one hundred thousand dollars, and if the jury had found that there was no contract limiting Jones to the sum of five hundred dollars, and that the value of his services was provable, they could not have rendered the verdict they returned.

"Whether or not there was a contract limiting Jones to a fee of five hundred dollars, was the first question for the jury to determine, and having found that there was such contract, all testimony as to the value of Jones' services and the value of the land involved in the Dawson suit became immaterial and not for the consideration of the jury. A ruling as to the admission or rejection of such evidence, in the face of the verdict of the jury would not constitute error, regardless of its character.

"Where the subject matter of an exception becomes immaterial in the progress of the cause, it cannot be assigned as error, even though the ruling was erroneous. (Citing authorities.)

"We do not wish to be understood as holding that the court committed error in the ruling upon this evidence in the court below, on the contrary, in our opinion, the rulings are sustained by the weight of authority, but, as the issue upon which this testimony was received, became wholly immaterial by the verdict of the jury, no prejudice could result to the plaintiffs in error, and error if committed, would be harmless.

* * * * * *

"Counsel for plaintiffs in error moved the court to strike out that portion of the testimony of witnesses Twitchell, Veeder and Leahy, relative to the value of the property, upon the ground, that the testimony of such witnesses is based on an assumed value, and that this assumption is not based upon the evidence nor was it disclosed to the jury. The synopsis of the testimony in chief shows, that all of these witnesses testified that they were familiar with the decisions rendered in the Dawson case, both in the Territorial Courts and Supreme Court of the

United States; that they had examined the record and proceedings in the case, and that they could express an opinion as to the value of Jones' services, in the absence of contract. The record of the proceedings in the Dawson case was introduced in evidence. It would appear from this, that their testimony was based upon the testimony in the case as to the value of Jones' services. Counsel in their brief state that the hypothetical question propounded on behalf of the defendants in error, to these witnesses, omitted the element of value of the property in the Dawson suit. The transcript has not brought into this court the hypothetical questions propounded in the court below, to these witnesses, and counsel's synopsis of the testimony in chief does not include these questions. In the absence of the questions which the court has a right to examine in determining their contents we must assume that the questions were properly framed. This objection is urged especially as to the testimony of Mr. Twitchell, but Mr. Twitchell testified 'My entire testimony has been given on the assumptions provided in the questions made to me by Mr. Spiess.' That there were hypothetical questions propounded to these witnesses, is not questioned, it is only objected that one element, which counsel for plaintiffs in error deems essential, was omitted. This court cannot assume the correctness of counsel's contention as to this omission, inasmuch as the hypothetical questions are not before the court." (*Transcript*, 97-99.)

As to the first of these propositions we submit, that so far from this evidence being immaterial in any aspect of the case, the verdict of the jury demonstrates that it was of the utmost importance, because without a clear idea as to the reasonable value of Jones' services, the jury could not properly weigh the evidence of Springer as to what he claimed was the contract, and therefore illegal evidence—opinions such as those of which we complain—was peculiarly calculated to mislead the jury, to the manifest disadvantage of the plaintiffs in error. There is no logic in the contention that all evidence as to the value of Mr. Jones' services became immaterial whenever the jury found that Mr. Springer's version of the contract was correct, because without a due appreciation of the value of

those services, the jury could not intelligently pass upon the probable truth of Springer's testimony. A vast number of adjudicated cases support the proposition that where there is a dispute as to the terms of an alleged contract, such as we have in the present case, evidence of the value of the subject matter of the contract is admissible as tending to show that such a contract was or was not probably entered into. A few of the many cases in which the point has been directly ruled are the following:

Barney vs. Fuller, 30 *N. E.*, 1008.
Flagg vs. Reilly et al., 48 *N. Y. Supp.*, 544.
Whitney Co. vs. Stevenson, 45 *N. Y. Supp.*, 552.
Walker vs. Johnson, 46 *N. Y. Supp.*, 864.
Allison vs. Horning, 22 *Ohio St.*, 146.
Swain vs. Cheney, 41 *N. H.*, 232.
Roberts vs. Roberts, 91 *Iowa*, 231.
Paddleford et al., vs. Cook, 74 *Iowa*, 433.
Johnson vs. Harder et al., 45 *Iowa*, 677.
Kidder vs. Smith, 34 *Vt.*, 291.
Bradbury vs. Dwight, 44 *Mass.*, 31.
Baxter vs. Wales, 12 *Mass.*, 365.
Leland vs. Stone, 10 *Mass.*, 459.

It is, also, a well recognized principle that the contract price and the value of property or services may be so variant that the mere disparity will raise a presumption of fraud, and while mere inadequacy of price is not ordinarily sufficient to defeat the enforcement of contracts at law if their existence be clearly established, yet a glaring inadequacy of price affords strong presumptive evidence that the contract if oral was never entered into, and if written was obtained by circumvention and fraud. *Hume vs. U. S.*, 132 *U. S.*, 414-415. Therefore, the jury could not properly at any time discard from consideration the reasonable value of Mr. Jones' services, even while attempting to arrive at a conclusion as to whether there was a special contract for five hundred dollars

($500.00). Were the plaintiffs in error prejudiced by the admission of the opinions of which we complain? There were two classes of expert witnesses introduced on behalf of defendants in error. One class testified that in their opinion the value of the property involved in the ejectment case was not material in determining the value of Mr. Jones' services. Their testimony was allowed to go to the jury without objection. Another class, including those of which we complain, testified that in their opinion the value of the property in controversy in the ejectment suit was material in determining the value of Mr. Jones' services, and that each had assumed in his own mind some value for such property, but they did not disclose, and were not asked to disclose to the jury what that value was. As to these latter, we say that the only theory upon which the action of the trial court can be sustained is, as it seems to us, that this court shall hold that we ought to have gone on and ascertained by further cross-examination of these witnesses, what assumptions they were making which were not disclosed, and thus have rendered competent their opinions. However plausible such a theory may appear at first blush, it will be found upon careful examination to be fallacious. Take the case of the witness Veeder, (set out in full in the statement in this brief), and the record shows that at the close of the cross-examination a motion to strike out was made upon the ground that, "it affirmatively appears from the testimony of the witness that his opinion as to the value of the services of A. A. Jones is based upon an assumption as to the value of the land in controversy in that suit, which assumption of value is not disclosed to the jury, *and is not based upon the evidence in the case.*" Why was it not incumbent on the parties offering this witness as an expert to ascertain from him these material matters which he was concealing from the jury? Certainly not because they were not in as good position as we were to do so. No adjudicated case has been found in which this exact point has been ruled, but we submit that we performed our full duty to the court and to the witness when we devel-

oped the fact that he was concealing from the jury something upon which he was basing his opinion, and that it is no answer to say that we might have made his opinion competent by further cross-examination. Upon the record as made, fundamental rules governing the reception of expert testimony were violated. It is unnecessary to a proper review of these rulings that we should have brought into the supreme court of New Mexico, or into this court the hypothetical questions propounded to these witnesses. We made, and we make, no objection to the form of those hypothetical questions, but we insist that we demonstrated upon cross-examination that the answers of the witnesses were not based entirely upon the hypothetical questions.

Rog. Exp. Test., 70.
Robb vs. Carpenter, 187 *U. S.*, 161.
Hitchcock vs. Burgett, 38 *Mich.*, 507.
Kempsey vs. McGinnis, 21 *Mich.*, 137.
Burns vs. Barnfield, 84 *Ind.*, 48.

II.

PARAGRAPH 13 OF THE CHARGE OF THE COURT WAS CLEARLY ERRONEOUS.

The court charged the jury in paragraph 13 as follows:

> "In this case the burden of proof is upon the plaintiffs as to every material fact, except that of payment, as to which fact the burden of proof is upon the defendants. In order to entitle the plaintiffs to recover in this case they must establish every such material fact with the exception aforesaid by a preponderance of the evidence; and if you find that the evidence bearing upon the plaintiffs' case is evenly balanced or that it preponderates in favor of the defendant, then the plaintiffs cannot recover, and you should find for the defendants." (*Transcript*, 65.)

To this paragraph of the charge objection was made,

> "* * * for the reason that the court therein fails to tell the jury what are the material facts in the case, and leaves to the determination of the jury the question of the materiality of each and every fact in evidence, and because it erroneously assumes that the defense of payment set up

in the answer involves a single fact and not several facts, and fails to tell the jury that on the issue of payment made by the pleadings, it devolves upon the defendants to show by a preponderance of the evidence that there was an agreement on the part of the plaintiff, A. A. Jones, to perform the services performed by him in the ejectment suit for a fixed sum, to-wit, five hundred dollars, and that said sum of five hundred dollars had been paid prior to the institution of the suit, in order to maintain the plea of payment; and because it fails to tell the jury that there is no evidence from which they would be authorized to find that the defendants had, prior to the institution of the suit, paid to the plaintiffs or any of them the reasonable value of the services rendered by A. A. Jones in the said ejectment suit." * * (*Transcript*, 66.)

Notwithstanding this objection, the court gave the charge as above quoted, and it was not until after all of the arguments, except the closing argument for plaintiffs in error, that an attempt was made to modify it.

It would seem that the fact that such an atempt was made at the time stated, sufficiently establishes that the trial judge was dissatisfied with the form of it, and was convinced that it was open to the objection made to it. At all events, there was an attempted modification, which was not accomplished, because the modification was not in writing, as required by the statutes of the Territory.

Paragraph 13 was, in the highest degree, misleading to the jury, because the jury were told that the burden of proof was on the plaintiffs to establish every material fact, except the fact of payment. There were, in truth, but two matters which were the subject of serious controversy between the parties. There was no dispute that Jones had been employed, or that he had rendered valuable services, or that those services had been accepted by the defendants in error. Neither was there any controversy as to the fact that Springer had paid Jones five hundred dollars. It was not even contended, by defendants in error, that five hundred dollars was the reasonable value of the services rendered; indeed, their own witnesses tes-

tified that the services were reasonably worth many times five hundred dollars. The reasonable value of the services was of course controverted, but the crucial fact in the case was the existence or non-existence of the agreement testified to by witness Springer. To maintain the defense of payment, it devolved upon defendants in error to establish by a preponderance of the evidence not the "fact of payment" as stated in this instruction, but every fact, the existence of which was involved in the issue of payment, the most important one of which was the existence of the special agreement relied on. The trial judge clearly stated the issue of payment in the third paragraph of his charge to the jury, as follows:

> "The defendants claim that Mr. Jones was employed to defend the said suit under a specific contract by which he agreed to give his services throughout the entire litigation in said suit for the sum of five hundred dollars; that said sum of five hundred dollars was fully paid before the commencement of this action." (*Transcript*, 63.)

Under this paragraph, was not the existence or non-existence of this special contract a material fact in the case? If the jury were unable, from the evidence, to say whether or not such a contract was made, what was their duty? Was it not clearly to decide that no such contract was made?

The plaintiffs in error sought to recover as upon a *quantum meruit* the reasonable value of the services of Jones; the defendants in error by their answer allege that they had, prior to the institution of the suit, paid Jones for those services. They did not plead the special five hundred dollar contract, as perhaps in strictness they ought to have done, but they sought to show by evidence in support of their plea of payment, that there was such a contract. Proof of the payment of five hundred dollars, without proof of the special contract relied on, would not maintain the plea of payment. The whole defense of payment rested upon the existence of the contract testified to by the witness Springer. This instruction, however, put upon plaintiffs in error the burden of proving that there was no such contract.

The objection taken by plaintiffs in error to this paragraph of the charge at the time it was delivered, called this matter directly to the attention of the trial judge. We asked him to specify what were the material facts which the plaintiffs in error were called upon to establish by a preponderance of the evidence. If that had been done, he must have told the jury that, if the plaintiffs in error proved the performance of the services, acceptance by the defendants in error, the reasonable value of the services, and the amount paid by the defendants in error on account thereof, they made a case entitling them to recover the reasonable value of the services, less the amount paid, unless the defendants in error, by a preponderance of the evidence, established the contract testified to by Springer, and that the agreed price had been paid.

If you eliminate from this case all evidence as to the existence or non-existence of the special contract for five hundred dollars testified to by the witness Springer, you thereby eliminate the defense of payment as completely as the same result could be accomplished by eliminating all evidence of the payment of money by Springer to Jones. It is true that the plea of payment does not, in the action of assumpsit upon a *quantum meruit*, admit that the services are worth the amount alleged in the declaration, but it does cast upon the defendant the burden of showing that he has paid all the plaintiff is justly entitled to receive. If that is not the legal effect of the plea, it must follow that a plea by the defendant that he has paid less than the plaintiff is entitled to receive, will bar the plaintiff's recovery.

The defendants in error in this case assumed the burden of showing, under their plea of payment, that they had paid for the services of Jones all that he was entitled to receive therefor.

Under the issue as made up in this case they could show this in either of two ways: First, by showing a special contract for an agreed price, and the payment of that price; or second, by showing that they had paid the reasonable value of the ser-

vices rendered. In either event it was incumbent upon them to show affirmatively all the facts necessary to establish their plea, and that too, by a preponderance of the evidence.

Refusing assent to this contention, the supreme court of New Mexico said:

> "Error is assigned upon the giving of instruction 13 in the original form, in the use of the word *fact* instead of the word *issue*, as used in the modified form which counsel concede to be a correct statement of the law. This assignment is made upon the theory that the court did not properly modify the charge. We cannot concede the correctness of the position of counsel for plaintiffs in error, even if the modification was ineffectual. While the word *issue* may, in many instances, be more comprehensive than the word *fact*, under the pleadings in this case there is no such difference as would be prejudicial to plaintiffs in error, and constitute reversible error. The original instruction was:
>
> "'In this case the burden of proof is upon plaintiffs as to every material fact, except that of payment, as to which fact the burden of proof is upon the defendants. In order to entitle the plaintiffs to recover in this case they must establish every such material fact with the exception aforesaid by a preponderance of the evidence; and if you find that the evidence bearing upon the plaintiffs' case is evenly balanced or that it preponderates in favor of the defendants, then the plaintiffs cannot recover, and you should find for the defendants.'
>
> "If the plea of payment had been the sale plea, there would be force in the contention of plaintiffs in error. Being an affirmative defense, the plaintiffs' case would have been confessed, and the onus would be upon the defendants in error to avoid the effect of this by proving payment in full. Or, if the defendants in error had also pleaded a general denial, but before trial had withdrawn it electing to stand upon the plea of payment, the defendants would then have assumed the affirmative, and the burden of proof being cast upon them, would have been entitled to have opened and closed the case.
>
> * * * * * *
>
> "But the plea of payment, pleaded as it was after a general denial, could not under any circumstances cast upon the defendants in error the burden except as to the *fact*

of payment as stated in the original instruction 13.

"Counsel for plaintiffs in error, in their brief, contending that the burden was cast upon the defendants in error under the plea of payment, insist that, 'under the issue as made up in this case they could show this in either of two ways: First, by showing a special contract for an agreed price, and the payment of that price; or Second by showing that they had paid the reasonable value of the services rendered. In either event it was incumbent upon them to show affirmatively all the facts necessary to establish their plea, and that too, by a preponderance of the evidence.'

"We do not so understand the law, unless the plea of payment was pleaded alone, or in the absence of a general denial. Plaintiffs in error assert that the burden of proof was on the defendants in error to show 'a special contract for an agreed price, and the payment of that price.' But under the general issue the burden was on the plaintiffs in error to prove the contract alleged and the amount due under it, the single fact of payment being left to the defendants in error, if, indeed, that was required of them. Therefore, this instruction was not prejudicial to the plaintiffs in error even in its original form and ought not to work a reversal of the cause." (*Transcript*, 94-95-96.)

The authorities cited and commented on by the court in this part of its opinion do not appear to be open to the interpretation given them, and, indeed, no case, so far as our investigation has gone, holds that a plea of payment ceases to be a plea of payment because pleaded in connection with a general denial. The court appears to overlook the fact that our complaint is not that the charge put the burden of proof on the plaintiffs in error as to all of the issues except the issue of payment. We concede that as to every other issue than that of payment, the burden of proof was on us, and the jury were so told. It was, however, the defendants in error who relied upon the special contract, and evidence of the existence of the special contract would not have been admissible under a general denial.

Register Printing Co. vs. Willis, 57 *Minn.*, 95.
Lautenschlager vs. Hunter, 22 *Minn.*, 268.

"The plaintiff declared on the common counts for work and labor done and for legal services performed by the plaintiff for the defendant. The defendant filed four pleas, all of which, except the second, are in denial of the plaintiff's cause of action, and amount to the general issue. The second plea is a plea of payment. There are only three assignments of error in the record. The first is to the giving of the written charge No. 1 requested by appellee (plaintiff in the court below). The other two are the refusal of the court to give the second and fourth written charges requested by appellant.

"The charge given at the instance of the appellee to which exception was reserved correctly states the law, both as to implied promise to pay a fair and reasonable compensation for services performed, as well as to the burden of proof. It is a well settled proposition of law in this state that where, in the absence of an express contract, valuable services are rendered by one person to another, which are knowingly accepted, the law will imply a promise to pay a fair and reasonable compensation for such services. *Hood vs. League*, 102 *Ala.*, 228, 14 *South.* 572; *Wood vs. Brewer*, 66 *Ala.*, 570. The appellee claimed nothing under a special contract, but relied on the common counts for legal services rendered and work and labor done. After he had made out a *prima facie* case under the evidence, and rested his case, the defendant sought to show a special contract between himself and the plaintiff, and payment under such contract. There was no attempt on the part of the defendant to show payment, except under the special contract which he set up in his evidence. That the burden of proof was on him, under the plea of payment, is beyond controversy (*Shulman vs. Brantley*, 50 *Ala.*, 81); and, if he could only show payment by setting up a special contract, the burden of proof was equally upon him to show such contract. He sought to overcome the *prima facie* case of the plaintiff by showing an independent fact, the existence of which he affirms, and the law casts upon him the burden of proving it when it is disputed."

McFarland vs. Dawson, 29 *So.* 328 (*Ala*).

To the same effect are the following cases:

Robinson vs. Parrish, 62 *Ill.*, 131.

Sanns vs. Neal, 38 *N. E.*, 882, (*Ohio*).

Skillings vs. Norris, 50 *Me.*, 72.
Pendleton vs. Cline, 85 *Cal.*, 142.

III.

THE ATTEMPTED MODIFICATION OF PARAGRAPH 13 WAS NOT IN WRITING, AND THIS ERROR WAS NEITHER INVITED NOR WAIVED.

The statutes of the Territory require that all instructions shall be in writing. All of our statutes on this subject are here set out:

"Sec. 2992. Upon the trial of any cause either civil or criminal in the district courts held within and for the various counties of the territory, all instructions to the jury asked by either party, whether given or refused, shall be in writing, and all instructions given by the court at the request of either party or upon its own motion shall be in writing; and it is hereby made the duty of the court in all cases, whether civil or criminal, to instruct the jury as to the law of the case, and a failure or refusal so to do shall be sufficient ground for a reversal of the judgment by the supreme court upon appeal or writ of error; Provided, however, That the parties to the suit or their attorneys may waive upon the record the instructions in writing.

"Sec. 2994. Before the argument is concluded either party may request instructions to the jury on points of law, which shall be given or refused by the court. All instructions asked and the charge of the court shall be in writing. The court shall instruct the jury as to the law of the case, but shall not comment upon the weight of the evidence.

"Sec. 2995. If the court refuse a written instruction, as demanded, but gives the same with a modification, which the court may do, such modification shall not be by interlineation or erasure, but shall be well defined, and shall follow some such characterizing words as, Changed thus, which words shall themselves indicate that the same was refused as demanded.

"Sec. 2996. The court must read to the jury all the instructions it intends to give and none others, and must announce them as given, and shall announce as refused, without reading to the jury, all those which are refused,

and must write the words ,Given, or, Refused, as the case may be, on the margin of each instruction.

"Sec. 2997. If the giving or refusal be excepted to, the same may be without any stated reason therefor, and all instructions demanded must be filed, and shall become a part of the record.

"Sec. 2998. After the argument the court may also, of its own motion, charge the jury. Such charge shall be in writing in consecutively numbered paragraphs, and no oral explanation thereof shall be allowed; and the provisions of this section shall also apply to the instructions asked by the parties.

"Sec. 3002. When the jury retires to consider its verdict it shall be allowed to take the pleadings in the cause the instructions of the court, and any instruments of writing admitted as evidence, except depositions.

"Sec. 2685. Sub-sec. 119. Whenever a ruling is made upon objections to the admission or rejection of testimony, or in the case of any other ruling or acts during the progress of a trial before a court or referee, or any ruling or decision at any time during the progress of a cause, it shall not be necessary to take any exception, but a review thereof may be had as if such exception had been taken and noted; and it shall not be necessary to object or except to the giving or refusal to give instructions to a jury in order to secure a review of the same on writ of error or appeal, but such instructions shall be reviewed in the same manner as if such instructions had been specifically excepted to at the time of giving or refusal to give same.

"Sec. 2685. Sub-sec. 128. When the evidence is concluded, and before the cause is argued or submitted to the jury or to the court sitting as a jury, either party may move the court to give instructions on any point of law arising in the cause which shall be in writing and shall be given or refused. The court may, of its own motion, give like instructions in writing, and all instructions shall be given by the court before argument and shall be carried by the jury to their room for their guidance to a correct verdict according to the law and the evidence." *C. L.* 1897.

The bill of exceptions recites that the court read the amended instructions from a carbon copy of the original charge in which certain words were stricken out, or crossed out with a

pencil, and other words were inserted with a pencil, and that after the amended instruction was read to the jury, counsel said to the court, "As thus modified, I think the charge is absolutely without objection, if the court please." Passing upon this objection, the supreme court of New Mexico said:

> "The modification made by the court in paragraph No. 13, as originally given, was to substitute in writing the word 'issue' for the word 'fact' or 'material fact.' This modification was made in conformity to the views of counsel for plaintiffs in error. There was no objection made to the method of modification, nor to its being read to the jury from a carbon copy. On the contrary, after all this was done, counsel for plaintiffs in error said, 'As thus modified, I think the charge is absolutely without objection.'
>
> "These proceedings took place in open court, and prior to the closing arguments in behalf of plaintiffs in error so as to enable counsel to present the cause to the jury upon the modified instruction. It is difficult to understand, therefore, how the jury could have been deceived or misled in that regard to the prejudice of plaintiffs in error. Counsel allege as error, that the modified instruction was not taken to the jury room, by the jury. The record does not seem to warrant this assignment. The record does not affirmatively show that any of the instructions were taken by the jury to their room, and yet, the instruction was modified, read to the jury, and the court had notified the jury that the original No. 13 had been withdrawn, before the jury retired. If counsel base this assignment upon the record statement as to what the stenographer did, it is clearly insufficient. The statement is, 'The amendment to the 13th instruction by the court to the jury, as thus made was also taken down by the court stenographer and transcribed by said court stenographer from his notes of the proceedings of the trial, and attached to the original charge on file, after the verdict of the jury had been returned.' The substance of the statements is, that the stenographer took down the court's modification, and having transcribed his notes of paragraph 13, as modified attached the same to the charge of the court on file, after the verdict had been rendered. But the record shows that the Chief Justice made the modification desired upon a carbon copy of the original paragraph 13 and read the

same to the jury. It is true the record is silent as to the actual handing of the charge, or any part of it to the jury, but it will be presumed that, that which should have been done, was done, in the absence of proof to the contrary or objection upon that ground. The stenographer may have done as stated, and yet, the charge and the modified carbon copy which had been substituted for the original paragraph 13, may have been before the jury while they were deliberating upon their verdict. The court seems to have done all in his power to correct paragraph 13 in accordance with the views of counsel for plaintiff in error, and to the method adopted, that the original paragraph was withdrawn and the amended one given then there was no objection at the time. If the court did not actually take the original paragraph from the jury, upon giving them the modified substitute, so that both were before them, it is inconceivable that the jury would be deceived or misled as to which they should consider. The phrase 'original charge on file' to which the stenographer attached his transcript, does not necessarily mean paragraph 13, as it may, and apparently does refer to the entire charge of the court. Taking the position that paragraph 13 was not modified and was not before the jury, counsel for plaintiff in errer make three assignments of error upon it: No. 9, that it was an oral modification, No. 10, that the original paragraph was not modified in writing as attempted, and No. 11, that part of the charge was not in writing. In our opinion these assignments are not well taken for the reasons above stated." (*Transcript*, 92-93.)

The opinion further suggests by implication that plaintiffs in error invited the trial judge to modify a carbon copy of the charge, or was aware that the modified instruction was read from a carbon copy of the charge, or that objection should have been made at the time that the carbon copy was used, although there is nothing in the record to justify a suspicion that counsel knew that a carbon copy was being used, and it is gravely said, "It would seem to be a dangerous precedent to hold that a new trial should be granted or reversal had, where the jury through carelessness, inadvertence or otherwise, fails to take the court's instructions with them after the same have been read to them." (*Transcript*, 93-94). Yielding to the

supreme court of New Mexico the profound respect which is its due, counsel feels constrained to protest that error is not assigned upon anything which the trial court was induced by counsel to do, and that there is nothing in this record which justifies the suggestion that counsel, in the supreme court of New Mexico, sought a reversal of the action of the trial court as to any action which was invited or waived on the trial. Certainly, when the Chief Justice told the jury that he had concluded to modify his previous instruction, "So the instruction will read, gentlemen, as follows," there was no reason why counsel should examine the paper which the Chief Justice held in his hand, on pain of being held to have waived the error if it afterwards turned out, as it does in this case, that it was not the instruction, but a carbon copy which was modified, as indicated. The verdict was rendered on November 30th, 1901. The motion for new trial was filed on December 4th, following, the bill of exceptions was not signed until September 2nd, 1903, and it affirmatively appears by this record that the "original charge on file" had not been modified when the bill of exceptions was signed. Therefore, we say that part of the charge was not in writing within the meaning of the territorial statute. We say further that we did not invite the judge to give any part of the charge not in writing, and we did not waive his failure to reduce his charge to writing. It appears inferentially from the bill of exceptions, that the Chief Justice had in his possession a carbon copy of the charge, and that he made certain erasures and interlineations thereon, but that carbon copy has never yet been made a part of the record in this case, and, of course, it was not delivered to the jury and could not properly have been delivered to the jury until it had been placed on file and become a part of the record. All that is recited in the bill of exceptions with reference to the action of the trial judge in modifying the carbon copy, and of the court stenographer in taking down and transcribing, after the verdict, the modification, merely show an intention on the

part of the Chief Justice to modify paragraph 13, and that such modification was not effectually made.

The carbon copy of the charge mentioned in the bill of exceptions can be considered in no other light than as a mere private memorandum of the judge. To concede that it fixes the character of the modification intended to be made, with the same degree of certainty that would have been accomplished if the judge had marked a paragraph in a printed book and had read from that paragraph to the jury, is to concede to it all the force which can fairly be claimed for it; indeed, it would seem that such a private memorandum retained by the judge in his own possession, is of much less stability for purposes of identification than a marked paragraph in a printed book would be. Yet, this court has held, in a case which came from the Territory of Utah, that marking a paragraph in a printed book was not in sufficient compliace with the statute of Utah, which is substantially like ours. It is said that the record does not show whether or not the jury took the original charge or the carbon copy when they retired, but the presumption is invoked that what the law required to be done was done. To the latter we agree, and we therefore insist that as the charge was not modified in writing and the carbon copy was not placed on file, it does appear that this carbon copy was not before the jury, but must have remained in possession of the judge, and that the "original charge on file" was the only "charge" which the jury had or could properly have had with them in the jury room during their deliberations.

Hopt vs. The People, 104 *U. S.*, 634.
New Albany Woollen Mills vs. Meyers, 43 *Mo. App.* 128.
Territory vs. Perea, 1 *N. M.*, 627.
Territory vs. Lopez, 3 *N. M.*, 156.
L. & N. R. Co. vs. Johnson, 81 *Fed. Rep.*, 679.

IV.

THE REFUSAL OF INSTRUCTIONS ASKED BY PLAINTIFFS IN ERROR WAS ERRONEOUS.

Plaintiffs in error asked two instructions which were refused by the court, and such refusal is made the basis of assignments of error numbers five and six. These assignments of error require no extended presentation, because it is practically conceded that the instructions contain correct statements of the law, and their refusal is justified on the ground that they are covered by the charge of the court. Whether or not they are so covered will be determined by a comparison of the refused instructions with those portions of the charge which deal with the same subject matter. We are not, of course, contending that the court was under any obligation to adopt our language, but we respectfully submit that there is nothing in the charge which covers the aspects of the case which we sought to have presented to the jury in the instructions asked for. While no objection was made to it, paragraph five of the charge of the court is not an accurate statement of our claim. It is as follows:

> "Plaintiffs claim, however, that the original contract in relation to the services of A. A. Jones was modified by a subsequent agreement made with the defendant, Charles Springer, to the effect that his compensation was not to be limited to the five hundred dollars originally fixed, but that he should go on with the litigation, see how it came out, and then Charles Springer would do what was right, *and after the property should be sold he would pay Jones a big cash fee.*" (*Transcript*, 96.)

That part of paragraph five "after the property should be sold he would pay Jones a big cash fee," was misleading to the jury, for two reasons. In the first place it was not the agreement which was sued on, and, in the second place, all conversations with reference to a big cash fee took place after all of the services had been rendered. The instruction asked for by us on this point, and refused by the court, was in strict conformity to the evidence. It was as follows:

"If the jury believe from the evidence that the plaintiff, A. A. Jones, agreed with the defendant, Charles Springer, to defend the case of the Maxwell Land Grant Company vs. John B. Dawson, for a fee of five hundred dollars, and that thereafter and before the rendition of all the services agreed to be rendered by said Jones in said cause, the said Springer said to the said Jones, 'You cannot be expected to attend to this business for any five hundred dollars; go on with the case and we will see how we come out, and after it is all over, you will be paid what is right,' or words to that effect, and such proposition was accepted and acted on by said Jones, then the plaintiffs in this case are entitled to recover for the services of said Jones in said case whatever the same may be reasonably worth, as shown by the evidence in this case." (*Transcript*, 68.)

Of course the fact that no objection was taken to paragraph five does not preclude consideration of exceptions reserved to instructions refused. We think also that the instruction asked with reference to the preponderance of the evidence should have been givn. It is as follows:

"The court instructs the jury that the credibility of the witnesses is a question exclusively for the jury; and the law is, that where two witnesses testify directly opposite to each other, the jury are not bound to regard the weight of the evidence as evenly balanced. The jury have a right to determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor and fairness; their apparent intelligence or lack of intelligence, and from all of the other surrounding circumstances appearing on the trial, which witness is the more worthy of credit and to give credit accordingly." (*Transcript*, 68.)

This instruction appears to have been peculiarly applicable to this case as it was presented to the jury.

Thorwegan vs. King, 111 *U. S.*, 554.

Tryon vs. Pingree, 112 *Mich.*, 338.

Deserant vs. Cerrillos, etc. Co., 178 *U. S.*, 409.

Durant Min. Co. vs. Percy etc. Co., 93 *Fed. Rep.* 166.

V

Strenuous exception was made to the bill of exceptions in this case at the time it was signed by the trial judge, because it was supposed that a statute of New Mexico prescribed the only method of making up a bill of exceptions. So much of the statute as is material is as follows:

> "In all cases tried by the Court, either with or without the intervention of a jury, the testimony, all rulings of the court, objections made and exceptions taken on the trial, shall be taken down by the court stenographer, unless waived by the parties to the action. After such trial any party to the action may require the court stenographer to transcribe the whole or any part of his stenographic notes, and when the stenographer shall have transcribed his notes, he shall file the same in the office of the clerk of the court, in which the action in which they were taken was tried, and thereupon either party to said cause desiring to have the same embodied in a bill of exceptions, may give ten days' notice to the opposite party of his intention of applying to the judge of the court in which said cause was tried, to have the judge of said court sign and seal said notes in proper form as a bill of exceptions and may at the same time give notice of his intention to ask that any additional matters proper to be so incorporated, also be incorporated therein. Upon such notice, unless such transcript shall be shown to be incorrect, and in that case after correction, the judge, or his successor, shall settle, sign and seal the said transcript as a bill of exceptions, adding thereto such additional matters properly sought to be added. For the purpose of having said bill of exceptions signed and sealed, it shall not be necessary to make out a new copy of the notes of said stenographer, but the same may be referred to and identified as a part of the bill of exceptions; nor shall it be necessary to serve a copy thereof with the notice. If, for any reason, it shall be impracticable to use the transcript of the stenographer's notes taken upon any trial in the manner above provided for, for the purpose of settling bills of exception, bills of exception may be settled, signed and sealed in the same manner as they had formerly been, when no stenographer was used." (*Laws*, 1899, *p.* 168-169.)

The trial judge having signed the bill of exceptions, not-

withstanding this objection, a motion was made in the supreme court of the Territory to strike out the bill of exceptions for the same reason. That motion was not passed on formally, but the court considered the case as if the bill of exceptions were properly before it. It is apparent from the record and the certificate of the trial judge that nothing has been omitted from the bill of exceptions which could have been of the slightest value in the review of the case, although the volume of the record has been greatly diminished by making up the bill of exceptions in the form in which it is made. This court would not receive with patience, if it would tolerate at all, a bill of exceptions which contained a complete transcript of the stenographer's notes of such a trial as this, which would merely entail additional labor upon the court without effecting any useful purpose.

Pomeroy's Lessee vs. Bank, 1 *Wall.*, 599.
Hickman vs. Jones, 9 *Wall.*, 199.
Lees vs. U. S., 150 *U. S.*, 482.
Godkin vs. Monahan, 83 *Fed.*, 123.

Respectfully submitted,

NEILL B. FIELD,
Counsel for Plaintiffs in Error.

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JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 146.

JOSEPH M. CUNNINGHAM, TRUSTEE; IDA MAY JONES, AND ANDRIEUS A. JONES, PLAINTIFFS IN ERROR,

vs.

CHARLES SPRINGER AND JOHN B. DAWSON, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

BRIEF OF DEFENDANTS IN ERROR.

CHARLES A. SPIESS,
Attorney for Defendants in Error.

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ALEXANDER BRITTON,
Of Counsel.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 24096

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IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

BRIEF OF DEFENDANTS IN ERROR.

Statement of the Case.

In this action the plaintiffs in error sought the recovery of seventy-five thousand dollars ($75,000) from defendants in error on account of legal services performed by Andrieus A. Jones for and on behalf of the defendants. The evidence in this action disclosed that John B. Dawson was living on a tract of land within the exterior boundaries of the Maxwell land grant; that the Maxwell Land Grant Company had commenced an action in ejectment against the defendant John B. Dawson; that some time prior to the commencement of that action John B. Dawson, having been advised that such

an action was about to be prosecuted against him, made a contract with the defendant Charles Springer, whereby he agreed to convey to Charles Springer an undivided one-half interest in and to all the minerals and coal underlying the surface of his claim in consideration of Charles Springer paying all the expenses of the litigation as well as effecting a sale of the property.

Charles Springer, after consulting many lawyers with a view to posting himself concerning the title of Dawson to the land he claimed, called upon Mr. Jones with the object of employing him to defend the title of John B. Dawson against the Maxwell Land Grant Company in the action of ejectment.

This entire controversy grows out of the contract of employment of Jones by Springer. It was not reduced to writing and rests entirely in parol.

Pursuant to his employment, Jones defended Dawson in the action of ejectment in the district court of San Miguel county, New Mexico. This trial resulted in a judgment in favor of Dawson. The cause was then reviewed by the Supreme Court of New Mexico, and Dawson was again successful. The cause was then removed by writ of error to this court, with the result that the judgment of the supreme court was reversed and the cause was remanded for a new trial.

Maxwell Land Grant Co. vs. Dawson, 151 U. S., 586.

Jones, acting as the attorney for Dawson on the new trial of the cause, again secured a judgment for Dawson. The Maxwell Land Grant Co. then removed the cause again to the Supreme Court of New Mexico, and afterwards dismissed its writ of error there without a trial having been had in that court.

At the time of Jones' employment there were no persons present other than Jones and Springer, and they were the only witnesses who testified in this action to the terms of

the contract under which Jones was employed. They *agreed* that at the time of the employment Jones undertook the defense of the ejectment suit *for five hundred dollars.*

Record, pp. 28 and 40.

They *disagreed* as to the *extent of the services* which Jones undertook to render under his contract of employment.

Jones in his testimony, in giving his version of the contract of employment, asserted

> "that Springer then said, 'Well, we will fix the fee
> " ' at five hundred dollars for the case in the district
> " ' court and in the Supreme Court of the Territory.'
> " and Springer thereupon gave Jones a check for one
> " hundred dollars on account of his fee; that nothing
> " was said about the case in the Supreme Court of the
> " United States or about a second trial or about a
> " second appeal to the Supreme Court of the Ter-
> " ritory."
>
> Record, p. 28.

Springer in giving his version of the contract of employment asserted

> " that he was not personally acquainted with Mr.
> " Jones and was introduced to him on the day when
> " he first spoke to him about the Dawson case and
> " told Mr. Jones something of the case, told him that
> " the Maxwell Land Grant Company had brought a
> " suit in ejectment against Mr. Dawson involving the
> " title to his ranch in Colfax county; that he had an
> " interest in the property and that he had to pay all
> " the expenses of the litigation; that he had come to
> " see if he could employ him; that Jones asked the
> " witness if he had employed or if he expected to
> " employ anybody else; that he told Jones he had no
> " intention of doing so; that he told Jones that the
> " case would undoubtedly be bitterly fought by the
> " Maxwell Land Grant Company and that they had
> " up to that time never been defeated in a lawsuit.
> " that the case would undoubtedly go to the Supreme

"Court of the United States and asked him what he "would charge him to conduct the litigation; and "Jones answered, 'I am willing to leave the matter "'entirely to you; that witness then said, 'I would like "'to have settled what your charges will be and asked "'Jones to state what his charge would be,' to which "Jones replied that he did not care to do that; that "witness said 'How would a fee of *five hundred dol-*"*lars do?*' to which Jones replied, '*That will be per-*"*fectly satisfactory,*' and witness said, '*That is for*"*the entire litigation,*' Mr. Jones after some hesita-"tion said, '*Yes, I am satisfied with that.*'"

Record, pp. 39 and 40.

Jones also testified that he was ignorant of the fact that Charles Springer had an interest in the subject-matter of the litigation, and that had he known it he would not have permitted Springer to fix the amount of his compensation and would not have made the original agreement for the five-hundred-dollar fee.

Record, p. 30.

Springer on his defense testified that he told Jones that he had an interest in the property and that he had to pay all the expenses of the litigation.

Record, pp. 39 and 41.

Jones also testified that in the fall of 1898 he brought up the matter of his compensation with Mr. Springer, and that Springer stated he (Jones) ought to wait until the property was sold and get a big cash fee out of the proceeds.

Record, p. 30.

Springer denied this in the following language:

"That neither at that time or place nor at any "other time or place did I ever say to Jones, 'Wait "'until the property is sold and then receive a big "'cash fee or anything of that substance or effect.'"

Record, p. 41.

This whole controversy hinged on the terms of the contract and the extent of the services which Jones was required to perform under the contract.

If Jones' version of the contract correctly stated its terms, then he had a cause of action against Springer.

If Springer's version of the contract correctly stated its terms, then Jones did not have a cause of action against Springer.

Each of the parties submitted his version of the contract to a jury, with the result that the jury by its verdict found the *"issues in favor of the defendants."*

Record, p. 11.

Points and Authorities.

Plaintiffs in error seek to reverse the judgment pronounced on the verdict of the jury and the affirmance thereof by the Supreme Court of New Mexico, and assign eleven errors in the proceedings which led up to the judgment. These eleven alleged errors may be grouped under two heads:

1. Alleged errors committed by the district court in refusing to withdraw certain evidence from the consideration of the jury.

2. Alleged errors committed by the district court in its instructions to the jury and its refusal to give certain requested instructions.

I.

The first, second, and third assignments of error all relate to the refusal of the district court to withdraw certain evidence from the consideration of the jury introduced by defendants for the purpose of establishing what would be reasonable compensation for the services of Jones in the event

such services were found to have been rendered by Jones pursuant to his version of the contract of employment.

In the trial of this cause two theories were by the evidence presented to the jury: That advanced by plaintiffs, to the effect that the contract of employment *did not* embrace the services of Jones rendered in the trial of this cause subsequent to the first trial of the cause in the district and supreme courts of New Mexico, and that advanced by defendants, to the effect that the contract of employment *did* embrace the services of Jones rendered in the trial of this cause subsequent to the first trial of the cause in the district and supreme courts of New Mexico.

The plaintiffs introduced the testimony of several lawyers, who gave to the jury their opinions as to the value of the services performed by Jones. This evidence only became material *in the event the jury accepted Jones' version of the contract as* truthfully and correctly expressing the terms of his contract, for if his compensation for all the services rendered by him had been fixed by contract, as testified to by Springer, then none of this testimony of the various lawyers was at all material; and the court by its instruction (Record, p. 65) categorically so charged the jury. This instruction is as follows:

> "If the jury believe from the evidence that the defendant Charles Springer made and entered into a contract with plaintiff A. A. Jones, under, which contract it was agreed by the said Jones that he would conduct the defense in the action of the Maxwell Land Grant Company against John B. Dawson through the entire litigation for the sum of five hundred dollars, and that such contract was not afterwards modified or rescinded, then you should not consider the evidence of the various attorneys who have testified to the reasonable value of the services of the said Jones, but should disregard the same for the reason that the contract has limited and fixed the amount to which said Jones is entitled; and if you so find and further believe

> " from the evidence that the said Charles Springer has
> " paid to the said Jones the said sum of five hundred
> " dollars so agreed upon and fixed by said contract,
> " then you should find in favor of the defendants."

And the supreme court of the Territory, in affirming the correctness of the view expressed by the trial judge by the above instruction, said:

> " Whether or not there was a contract limiting
> " Jones to a fee of five hundred dollars was the first
> " question for the jury to determine, and having
> " found that there was such contract all the testimony
> " as to the value of Jones' services and the value of
> " the land involved in the Dawson suit became im-
> " material and not for the consideration of the jury.
> " A ruling as to the admission or rejection of such
> " evidence in the face of the verdict of the jury
> " would not constitute error, regardless of its char-
> " acter."
>
> Record, p. 98.

To rebut the testimony of these various lawyers, the defendants also put in evidence the opinions of various other lawyers who gave their opinions to the jury as to the value of Jones' services, in the event it was found no contract had fixed the compensation for all the services rendered by Jones.

The evidence of these witnesses was elicited by an hypothetical question which is not preserved by the record. The bill of exceptions in this cause omitted the questions asked these witnesses, and it will be presumed that the question contained every element and fact essential to form a basis for the opinion and conclusion expressed by the witnesses.

To properly review the answers of the witnesses, it is necessary that the question to which the answer is a reply should be considered in connection with the answer, because the question is a part and qualification of the answer and its absence precludes a review of the answer.

In giving its assent to this proposition, the Supreme Court of New Mexico said:

> "Counsel in their brief state that the hypothetical "question propounded on behalf of defendants in "error to these witnesses, omitted the element of "value of the property in the Dawson suit. The "transcript has not brought into this court the hypo-"thetical questions propounded in the court below "to these witnesses, and counsel's synopsis of the "testimony-in-chief does not include these questions. "In the absence of the questions which the court has "a right to examine in determining their contents "we must assume that the questions were properly "framed. This objection is urged especially as to "the testimony of Mr. Twitchell, but Mr. Twitchell "testified: 'My entire testimony has been given on "the assumptions provided in the question made to "me by Mr. Spiess.' That there were hypothetical "questions propounded to these witnesses is not ques-"tioned, it is only objected that one element which "counsel for plaintiffs in error deems essential was "omitted. This court cannot assume the correct-"ness of counsel's contention as to this omission, in-"asmuch as the hypothetical questions are not be-"fore the court."
>
> Record, pp. 98-99.

Without reference to the hypothetical question propounded these witnesses, the record as presented by the plaintiffs in error discloses that these witnesses by their answers took into consideration only facts properly in the case and embraced elements which may properly be considered in fixing the value of an attorney's services; but it is objected that *all* of the facts in evidence, or which might be put in evidence and considered in fixing the reasonable value of an attorney's services, were not included in the answer of the witness, and particularly that the *value* of the property in litigation was not taken into consideration by the witnesses, or, if it was so considered, that this element was not disclosed

to the jury. The objection to the omission of this element by the witnesses in expressing their opinion does not go to the *competency* of the evidence, but merely affects the strength or weight of the testimony.

The value of professional services is made up of so many complex and collateral elements that absolute accuracy is unobtainable.

The testimony of these witnesses furnished some evidence which the jury might have considered in arriving at a verdict. If one element which goes to make up the value of an attorney's services was omitted by the witnesses, this infirmity simply affects the weight of the testimony.

That a hypothetical question is not required to embrace all of the facts proven or elements which may be considered upon the particular subject under investigation has been many times expressly ruled by the courts of the United States. Thus, in *Turnbull vs. Richardson,* 69 Mich., 413, the court said:

> "Hypothetical questions may, and often must, in "order to convey any meaning whatever, embrace "facts assumed or proven, which are not, standing "alone, the subject of expert testimony. *Such ques-"tions need not state all the facts in the case.* If the "facts stated are in the case, or afterwards proven, "and they are such as to form the basis of an opin-"ion by an expert, the question is proper, although "it does not contain a statement *of all the facts.* "The value and weight of the answer or opinion will "depend very much upon whether the question con-"tains a full or only partial statement of facts. So, "too, as to being explicit, certain, and containing "fullness of detail; all these considerations are "proper to be addressed to the jury and weighed by "them."

In *Denver & Rio Grande Ry. Co. vs. Roller,* 100 Fed. Rep., 738, 754, the court said:

"In all that we have said, it must be distinctly "understood that we do not deny the general propo- "sition urged by counsel, but here expressly affirm "the same—that it would be reversible error to ad- "mit the answer of expert witnesses to hypothetical "questions which assume the existence of facts upon "which no evidence is offered. But when the ques- "tion assumes the existence of any state of facts "which the evidence directly, fairly and reasonably "tends to establish or justify, and does not transcend "the range of evidence, it is proper to permit such "questions to be answered, and it is not necessary "that the questions shall embrace or cover all the "facts in the case."

In *Davidson vs. State*, 34 N. E., 987-994, the court said:

"The questions to which the appellant urged his "objection did nothing more than call for the opin- "ion of the witnesses upon subjects to which they "were competent, as experts, to testify. As to the "second objection, it would seem to be sufficient "to say that it was not necessary that the hypothet- "ical questions propounded to the witnesses should "embrace all the facts proven upon the particular "subjects under investigation. In the examination "of expert witnesses, counsel may embrace in his "hypothetical question such facts as he may deem "established by the evidence, and if opposing coun- "sel does not think all the facts established are in- "cluded in such questions, he may include them in "the questions propounded on cross-examination. "Any other course would result in endless wrangles "over the question as to what facts were and what "were not established. Citing Goodwin *vs.* State, 96 "Ind. 57; Rogers' Expert Testimony, p. 39; Stearns "*vs.* Field, 90 N. Y., 640."

In *Brooks vs. City*, 87 N. W., 682-83, the court said:

"Many objections are made to hypothetical ques- "tions asked of expert medical witnesses, on the

"ground that they do not embody all the facts as "shown by the record, but it is well settled that a "hypothetical question is not improper simply be- "cause it includes only a part of the facts in the "record."

In *Cole vs. Fall Brook Coal Co.*, 159 N. Y., 59; 53 N. E. Rep., 670, the court said:

"In framing a hypothetical question counsel may "base it upon the truth of all the evidence or upon a "hypothesis specially framed on certain facts assumed "to be proved for the purpose of inquiry. The ques- "tion is not improper simply because it includes only "a part of the facts in evidence."

In *Stearns vs. Field*, 90 N. Y., 640-641, the court said:

"After a discussion of the evidence to show that "the questions were justified, the opinion continues: "'It is now argued by the appellant that the question "'is defective in that it does not state enough. This "'objection was not made at the trial. If, in the "'opinion of the counsel, there was evidence other "'than that supposed proper for the witness to con- "'sider, his attention should have been called to it "'upon cross-examination. Such a question is not "'improper, because it includes only a part of the "'facts in evidence.'"

In *Horn vs. N. J. Steamboat Co.*, 48 N. Y. Supp., 348-51, the court said:

"In framing hypothetical questions to be put to a "witness counsel are required to confine themselves "to facts which are proven, or which the jury might "find, or any facts which might be assumed from the "evidence already in the case, and which are parti- "nent to the theory they are attempting to uphold. "But counsel are not called upon, in framing a hypo- "thetical question, to present all the facts which have "been made to appear. If they keep within the facts "and fair inferences from them, they have done all

"that can be required; and the hypothetical question "thus framed is not objectionable. If the question "omits facts which are material and pertinent to the "inquiry, that is a subject of comment to the jury, "and so far as those facts are omitted, the weight to "be given to the testimony elicited by the question is "impaired; but that does not at all affect the com- "petency, however much it may affect the conclu- "sions the jury are to draw from the answer. An "examination of the question which was objected to "will show that every fact assumed in the question "might have been found by the jury from the evi- "dence which had already been made to appear."

The case of *Morrill vs. Hershfiel*, 47 Pac. Rep., 997-998, is conclusive upon this proposition. That was an action to recover an attorney's fee, and the hypothetical question objected to in that case omitted the element or the fact of the result of the suit. Preliminary to a discussion on the competency of the hypothetical question, the court said:

"* * * The jury awarded the plaintiff eleven "hundred and ninety-four dollars. To the hypo- "thetical question asked the several witnesses who "were called as experts, the appellant objected be- "cause the question propounded did not include one "of the elements entering into a determination of the "reasonableness of the compensation of an attorney, "viz., whether or not the action in which the services "were rendered was decided in favor of the defend- "ant or against him. The court overruled the objec- "tion and permitted the question and answers to be "read to the jury, and it is this alleged error alone "that appellants relied upon.

"The better rule appears to be that in an action "brought by an attorney to recover the reasonable "value of his services in the conduct of a lawsuit, it is "proper that the result of the litigation be laid before "the jury as one of the elements to be considered by "them in arriving at a just valuation to be put upon "his services. Randall *vs.* Packard, 142 N. Y., 47; "Stevens *vs.* Ellsworth, 63 N. W., 683.

"But while it is one of the proper elements for consideration, we cannot say that it is so essential as to require us to conclude that its omission on direct examination was prejudicial to the appellant's rights. We must assume that the appellant had notice of the taking of the deposition and of the interrogatories that were to be propounded to the experts. He, therefore, had an opportunity to cross-examine them and to include the element of the result of the litigation in his cross-examination if he desired to do so. So far as the question propounded to the experts went, it is not complained of, and the rule is when a witness has expressed an opinion based upon the facts assumed by the one whose witness he is, the opposing party may cross-examine him, by taking his opinion based upon any other facts assumed to have been proved by the evidence, provided, of course, that such hypothetical state of facts is fairly within the scope of the evidence adduced on the trial. If the question asked of the witness is defective because it does not state enough, and in the opinion of counsel there was evidence other than that included in the hypothetical question, which he believed it was proper for the witness to consider, the attention of the witness should be called to it upon cross-examination; citing Davidson *vs.* State, 34 N. E., 972; Goodwin *vs.* State, 96 Ind., 550; R. R. Co. *vs.* Compton, 75 Texas, 667; Rogers' Expert Testimony, sec. 27. But the question put him may not be improper because it includes but a part of the fact in evidence; citing Sterns *vs.* Field, 90 N. Y., 640; Mercer *vs.* Voss, 67 N. Y., 56; Thompson on Trials, sec. 625."

In the case at bar, as in the case just quoted, the objection was not taken to the hypothetical question, but the evidence elicited by the question was objected to.

Plaintiffs in error in their brief cite the case of *Raub vs. Carpenter*, 187 U. S., 152, as bearing out their contention that a hypothetical question propounded to an expert must embrace all the facts and elements in evidence concerning and which go to qualify the matter under investigation.

In that case the expert was asked the following question:

> "Doctor, have you formed any opinion from your "uncle's general condition of health and the condi- "tion disclosed by his brain at this investigation *and* "*from all you know about him yourself* what his "condition of mind was?"

The objection offered to this question was to the portion *"and from all you know about him yourself."*

Discussing this objection, the Supreme Court of the United States says:

> "Clearly the opinion of the witness from facts he "did not disclose was inadmissible. If he knew any- "thing about the deceased other than what he stated, "which aided him in arriving at a conclusion, that "knowledge should have been developed.
>
> "In that particular the question assumed the *ex-* "*istence of facts for which there was no foundation in* "*the evidence.*"

This case in no wise can be construed as authority against the proposition for which we have been contending. Our contention, which is overwhelmingly supported by the authorities, is that a hypothetical question, or the answer thereto, is competent if it is *based upon facts in evidence in the case,* although all of the facts in evidence are not considered either by the question or answer. The answer of the witnesses Twitchell, Veeder, and Leahey all have for their foundation *facts in evidence in the cause,* whatever construction may be put on their answers. No part of their answers is based upon *facts not in evidence,* as was the case of the question held improper in *Raub vs. Carpenter, supra.* Moreover, in that case this court impliedly holds that a question need not contain all the facts which may be considered in expressing an opinion upon the subject under investigation, for it there says:

> "The question as framed could not properly have "been allowed to be propounded, though caveators

"were left free to put it with the objectionable words "omitted."

From the above authorities it may be deduced that a hypothetical question must be based on the evidence in the cause; that all the facts necessary in arriving at a conclusion need not be embraced in the question; that if some fact or element is omitted, that then it devolves upon the opposite party to take the opinion of the witness on the matter with the omitted fact or element included on cross-examination, or he may comment on the frailty of the opinion expressed in answer to a question which omits an element necessary to a correct conclusion in addressing the jury.

Now, testing the answers of the witnesses which plaintiffs in error sought to have withdrawn from the jury by the above rule, we find that the evidence of the witness Veeder, whose testimony plaintiffs sought to have withdrawn from the jury, was all based on evidence and facts in the case, and, moreover, on the testimony of Jones himself (Record, p. 45); that the evidence of the witness Leahy was likewise all based on evidence and facts in the case, and so, too, the evidence of the witness Twitchell was all based on evidence and facts in the case.

The authorities are quite uniform to the effect that if an element or fact is not considered by the witness in giving his opinion, that then the weight to be given to the testimony elicited by the question is impaired; but that it does not at all affect its competency, and that if opposing counsel does not think all the facts established are included in such questions he may include them in the questions propounded on cross-examination.

No attempt was made by plaintiffs' attorney to take the opinion of the witnesses Veeder, Leahy, and Twitchell on the question of the value of Jones' services, on the hypothesis that the land in litigation was of the value of $400,000, the value fixed by their witnesses; but, on the contrary, in cross-examining the witness Leahy the attorney who examined

him expressly forbade him stating what value he fixed on the land in litigation, as will be seen by reference to the following:

> "JEREMIAH LEAHY, a witness on behalf of the de-
> "fendants, was sworn and examined * * *. Upon
> "cross-examination the witness was interrogated as
> "follows:
> "Q. In estimating the value of Mr. Jones' services
> "in that case have you made any mental assumption
> "as to the value of the property involved?
> "A. I have—in this way.
> "Q. I do not ask you what it is. I ask you if you
> "have.
> "A. Yes, sir.
> "Q. And your estimate of the value of Mr. Jones'
> "services is based on the valuation of that property
> "which you have fixed in your own mind?
> "A. Yes, sir, from——.
> "Q. Never mind from what. It is based on the
> "valuation which you fixed on the property in your
> "own mind.
> "A. No, sir, not entirely so."
>
> Record, p. 53.

Plaintiffs in error cite a large number of authorities to the effect that where there is a dispute as to the terms of an alleged contract evidence of the value of the subject-matter of the contract is admissible as tending to show that such a contract was or was not probably entered into.

We concede the correctness of this proposition.

In the trial of this cause there was no attempt made by the trial court to deprive plaintiffs from making such proof. Indeed, some three or four witnesses testified that Jones' services were worth from seventy-five to one hundred twenty-five thousand dollars, and the jury had that evidence before it when it reached the conclusion that all of Jones' services had been provided for by the contract.

In all the cases cited above, wherein it was held that evidence is competent which has been elicited by a question which does not take into consideration all of the elements which go to make up the value of a given thing, attempts were made to prove value, or the condition of things, and it was held that the omission of some one of such elements only went to the weight of the testimony and did not affect its competency.

But, even if the court did commit error in refusing to withdraw from the consideration of the jury the evidence expressed in the opinions of the witnesses Veeder, Leahy, and Twitchell, it was error without prejudice, because the jury by its verdict found that the plaintiff had no cause of action.

The testimony of the experts was put in evidence only for the purpose of aiding the jury in arriving at and fixing the value of Mr. Jones' services, in the event that his theory of the case was adopted by them, and had no application whatever to the theory of the defendant. The jury by its verdict adopted the defendant's theory and discarded the plaintiffs' theory.

If an erroneous rule was given, or if erroneous evidence was admitted for fixing the value of Mr. Jones' services, and the jury found that he had no cause of action at all, it is obvious that it did not apply the erroneous rule or the erroneous evidence in measuring the value of the services.

In *Consolidated Coal Co. vs. Maehl*, 22 N. E. Rep., the court said at page 716:

> "The engineer testified that he had run the engine
> "connected with the hoisting apparatus at this mine
> "for two months prior to the injury of Maehl, and,
> "over appellant's objection, was permitted to testify
> "to his want of experience and competency at the
> "time of his employment and to what proficiency he
> "had attained as an engineer at that time. This, it
> "is insisted, was error and tended to the prejudice
> "of appellant. We think that in so far as it tended

"to show his capacity at the time of the accident it "was clearly competent. It was for the jury to say, "if they found that the injury resulted through the "fault or negligence of the engineer, whether he was "a competent, experienced and sober engineer, such "as appellant was required to place in charge of its "engine, used in lowering into or hoisting persons "from the mine. His previous training and experi- "ence, or want of it, would furnish one means by "which a conclusion might be reached. But aside "from this, the jury, by their second special finding "expressly found that Machl's death was not caused "by the negligence of the engineer, and it cannot be "seen that this evidence, *if improper*, could have "prejudiced appellant."

In *Manning vs. Bresnahan*, 63 Mich., 584-587, the court said:

"We do not discover any error in the instructions; "and the jury, having found a verdict for the de- "fendant, must have found that the sale to plaintiff "was fraudulent as to the plaintiffs in the attach- "ment suit. This being so, the first point taken by "plaintiff becomes unimportant. This relates to the "exclusion of testimony tending to show a loss of "profit by reason of the attachment. The testimony "excluded did not go to the right of plaintiff to re- "cover, but to the extent of her recovery; and the "jury having found that she had no cause of action, "if the testimony was erroneously excluded, it was "error without prejudice."

In the case at bar the evidence of the expert witnesses objected to by plaintiffs' counsel did not go to the right of the recovery by Jones, but to the extent of his recovery. The jury found he had no right of recovery at all; consequently they did not consider the extent of this recovery.

And in *Alexander vs. Town of Oshkosh*, 33 Wis., 277-280, the court said:

"An exception was taken to the ruling of the court "below in not allowing the plaintiff to prove the loss

" of his business in consequence of the injury he had " received, and what that business was worth per " annum. It is said that this evidence was proper " to show the amount of damages the plaintiff had " sustained. Concede that this view is correct and " yet it is obvious that the error becomes wholly im- " material when we consider the result arrived at by " the jury. For the jury found no cause of action, " and that the plaintiff was not entitled to recover any " damages. So this ruling, even if erroneous, could " not have worked any injury to the plaintiff in view " of the verdict."

Baumgardner vs. Willett, 66 Pac., 1001.
A. T. & S. F. R. R. vs. Sly, 21 Pac., 790.
Yaeger vs. S. P. Ry., 51 Pac., 190.
K. C., etc., R. R. vs. Chamberlain, 60 Pac., 15.
Kendall vs. Davenport, 65 Pac., 688.
Fowler vs. Phœnix, etc., 57 Pac., 421.
Thompson vs. Schuster, 28 N. W., 858.
Knapp vs. Sioux Falls Nat. Bank, 40 N. W., 587.
Parrot vs. Swain, 29 Ill. App., 266.
Burnett vs. Luttrell, 52 Ill. App., 19.
Caruthers vs. Murray, 75 Ia., 173.
Norton vs. Foster, 12 Kan., 44.
Moody vs. Camden, 61 Me., 264.
Pollan vs. Brownell, 131 Mass., 138.
Parsons vs. Sutton, 39 N. Y. Supp., 544.
Read vs. Bichols, 118 N. Y., 224.
Nonis vs. Northhouse, 46 Vt., 587.
Fulham vs. Howe, 60 Vt., 351.
Schrubbe vs. Connell, 69 Wis., 476.

Plaintiffs in error by their fourth assignment of error complain of the action of the trial court in refusing to withdraw so much of the testimony of R. E. Twitchell as related to the value of coal lands in New Mexico.

The witness Twitchell, testifying upon cross-examination in response to questions propounded to him by plaintiffs, stated:

> "My understanding of fair market value of prop-
> " erty is what it will bring at forced sale after fair
> " and reasonable publication in the centers where
> " money can be had to purchase."

He was then asked:

> " Q. Your estimate of the value of Mr. Jones'
> " services is based upon your opinion as to what this
> " property would have brought at forced sale in
> " centers where money could have been had to pur-
> " chase it?"

He answered:

> " A. No, sir, it is based upon the services rendered
> " by Mr. Jones in the prosecution of this suit."
> Record, p. 45.

This evidence was brought out on cross-examination by the plaintiffs, and if it injured them they have only themselves to blame for it.

It was by their act and not by defendants put in evidence. However, if there was any error in permitting his testimony upon that point to remain with the jury, it was harmless, in view of the jury's finding, as has been heretofore pointed out.

II.

The other assignments, viz., five, six, seven, eight, nine, and ten, all relate to the instructions given and refused by the trial court. These assignments will be discussed *seriatim*.

A.

The refusal of the Court to give the following instruction is assigned as error:

> "If the jury believe from the evidence that the "plaintiff, A. A. Jones, agreed with the defendant, "Charles Springer, to defend the case of the Max- "well Land Grant Company *vs.* John B. Dawson, "for a fee of five hundred dollars; and that there- "after and before the rendition of all the services "agreed to be rendered by said Jones in said cause "the said Springer said to the said Jones, 'You can- "'not be expected to attend to this business for any "'five hundred dollars; go on with the case, and we "'will see how we come out, and after it is all over, "'you will be paid what is right,' or words to that "effect, and such proposition was accepted and acted "on by said Jones, then the plaintiffs in this case "are entitled to recover for the services of said Jones "in said case whatever the same may be reasonably "worth, as shown by the evidence in this case."

We confidently submit that the jury were substantially instructed by the court upon the law applicable to all matters and things contained in the above requested instruction in its instructions numbered 4, 5, and 8, viz:

4.

> "Plaintiffs admit that there was a contract made at "the time of Mr. Jones' employment in said case fix- "ing the amount of his compensation at five hundred

"dollars for the trial of the cause in the District "Court and Supreme Court of the Territory, and that "three hundred dollars was paid to plaintiff, Jones, "under said contract, but they deny that said con- "tract covered any services of Jones in the Supreme "Court of the United States, or when said cause "came back for trial to the District Court and Su- "preme Court of this Territory for the second trial."

5.

"Plaintiffs' claim, however, that the original con- "tract in relation to the services of A. A. Jones was "modified by a subsequent agreement made with the "defendant, Charles Springer, to the effect that his "compensation was not to be limited to the five hun- "dred dollars originally fixed, but that he should go "on with the litigation, see how it came out, and "then Charles Springer would do what was right, "and after the property should be sold he would pay "said Jones a big cash fee."

8.

"If the jury believe from the evidence that the "original contract in relation to Mr. Jones' compen- "sation was afterwards modified so that such com- "pensation was not to be limited to the $500.00 "agreed upon, then you should find for the plain- "tiffs in such sum as you believe from the evidence "to be the reasonable value of the services of Jones, "less whatever sum may have been paid thereon."

The fifth instruction of the court, read in connection with the eighth, completely covers everything contained in the requested instruction.

In stating the theory of the plaintiffs' case that the original contract had been modified, the court in its instruction used the language, that Springer "after the litigation was ended *would do what was right.*" The requested instruction used the language, "After it is all over you will be *paid* what is right."

When it is considered that Springer had no other act to perform but to *pay*, it will readily be seen that there would

be no substantial difference between "*doing* what was right" and "*paying* what was right."

But the court by no rule of law was required to give a categorical instruction based on the plaintiffs' theory of the case, and embody in such instruction the evidence or facts which they assumed modified the contract. The jury had all the facts before it. It had before it Jones' testimony, wherein he claimed that the original contract had been modified, and they were by the court instructed in its eighth instruction fully as to their duty in the event they found from the evidence that the original contract had been modified.

The court had a right to assume that the jury remembered the evidence upon which a modification of the contract was claimed, and was not required to set out such evidence in its instructions.

The judge in charging the jury may exercise his discretion as to the form in which he expounds the law and comments on the case. It is a rule of universal application that the court is not bound to instruct the jury in the exact language of the request, but may instruct in such terms and such a manner as shall comport with the real merits of the case.

The plaintiffs desired a direction to the jury, as to their duty in the event it was found that there was a modification of the original contract. The court by its eighth instruction discharged its full duty in that regard.

Continental Improvement Co. vs. Stead, 95 U. S., 165.
Boyce vs. California Stage Co., 25 Calif., 960.
Birmingham Fire Ins. Co. vs. Pulveri, 126 Ill., 329.
White vs. Gregory, 126 Ind., 95.
Larsh vs. Des Moines, 74 Iowa, 512.
Missouri Pacific R. R. Co. vs. Cassity, 44 Kan., 207.
Naples vs. Raymond, 72 Me., 213.
Kersner vs. Kersham, 36 Md., 334.
Champlain vs. Detroit Lumpling Co., 68 Mich., 238.
Norwood vs. Sommerville, 159 Mass., 105.
Law vs. Grimes Dry Goods Co., 38 Neb., 215.
Ayers vs. Watson 137 U. S., 584.

B.

The action of the court in refusing to give the following instruction is assigned as error:

> "The court instructs the jury that the credibility "of the witnesses is a question exclusively for the "jury; and the law is, that where two witnesses testify "directly opposite to each other, the jury are not "bound to regard the weight of the evidence as evenly "balanced. The jury have a right to determine from "the appearance of the witnesses on the stand, their "manner of testifying, their apparent candor and "fairness; their apparent intelligence or lack of intel- "ligence and from all of the other surrounding cir- "cumstances appearing on the trial, which witness is "the more worthy of credit and to give credit accord- "ingly."

This requested instruction is fully covered by instructions numbered 14 and 15 as the same appear on pages 65 and 66 of the printed record.

The requested instruction was merely advisory, or, as it is sometimes termed, a "*cautionary*" instruction touching the credibility of witnesses. The refusal to give this instruction would not have been error, even though it had not been fully covered by the instructions given.

Kelley vs. Schupp, 60 Wis., 76-86.

C.

The action of the court in giving instruction number 13, appearing at page 65 of the printed record, and the proceedings of the court in modifying the same are assigned as error. (See seventh, eighth, ninth, and tenth assignments of error.)

The record discloses (Record, p. 69) that after all the arguments had been concluded by counsel for the defendants, and before the closing argument for plaintiffs had been made, the court modified its instruction numbered 13 by striking out the word "*fact*" and inserting in lieu thereof the word "*issue;*" that the modification was reduced to writing (see Record, p. 69) and read to the jury from a carbon copy of the original charge; that after the verdict of the jury had been returned the court stenographer made the same modification on the original charge.

There was no objection made to the method employed by the judge in making this modification, and it was not suggested by any one that another course should be pursued. Counsel for plaintiffs expressed no dissatisfaction with the proceedings, but seemed to be eminently satisfied therewith, the principal counsel for the plaintiffs, Mr. Field, exclaiming, "As thus modified, I think the charge is absolutely without objection, if the court please." (See Record, p. 69.)

While sub-section 119 of section 2685, Compiled Laws of New Mexico, 1897, has dispensed with the necessity of objecting and excepting to the giving of or refusal to give instructions in order to secure a review of the same, it is necessary to make seasonable objection to such proceedings as were had in the modification of instruction number 13 in order to secure a review thereof. There is no code provision or practice act of New Mexico which relieves parties from objecting to such proceedings if they desire a review of them.

In *Neher vs. Armijo*, 66 Pac., 518-519, the Supreme Court of New Mexico said:

> "It is fundamental that errors complained of must "be objected to and exceptions saved, or they will "be disregarded in an appellate court * * * In "so holding we are not unmindful of sub-section 119, "section 2685, Com. Laws, 1897, which dispenses "with formal exception, but in no sense dispenses "with objection in order to preserve the error com- "plained of. We simply hold that objection must "be preserved according to the forms of law to be "available in this court."

And on pages 519-520 that court further says, in discussing the necessity for objection under section 897, C. L., 1897, of New Mexico:

> "Can it be pretended that immaterial, invited or "waived errors are to be passed upon? We think "not. An error of the trial court ceases to be such in "the appellate court if the same is immaterial, in- "vited or waived. We are confirmed in this conclu- "sion by the persistent ruling of this court ever since "this statute was passed in 1889, to the effect that "only such errors as are properly saved and repre- "sented will be considered."

See also *Chaves vs. Meyers*, 68 Pac., 917, and *Jung vs. Myers*, 68 Pac., 933.

Section 85 of the Code of Civil Procedure declares that the court shall disregard all errors, defects, or imperfections occurring at any stage of the trial, which do not affect the substantial rights of the parties.

This is in accord with and exemplifies the policy of the legislature in enacting the remedial provisions of the code requiring a disregard of unsubstantial and uninjurious irregularities.

These assignments of error based on the proceedings mentioned are hypercritical in the extreme.

It is not pointed out how plaintiffs were in the least prejudiced thereby, and it cannot be conceived how they could have been prejudiced by the course pursued by the court.

While the word "*fact*" was stricken out and the word "*issue*" inserted in lieu of it, there was no substantial change effected in the instruction. The term every "issue" necessarily means the same as every "fact." The court instructed the jury that the burden of proof as to every material fact was upon the plaintiff, except that of payment, as to which fact the burden was upon the defendants. The "issue" of payment is a fact. Using the word "fact" instead of "issue" did not impose on the plaintiffs any additional duties or relieve the defendants of any duties, or in anywise change the *quantum* of proof either side was required to produce.

The term "*issue*" is broader and may include more than the term "*fact,*" and an issue may embrace many facts; but many facts in that case would be coextensive with the "issue" they, when taken together, make up. If, then, the court directed the jury that the plaintiffs must prove by a preponderance of the evidence every fact except payment, it was tantamount to directing them that they must prove every issue except payment. In requiring plaintiffs to prove by a preponderance of evidence all the facts in the case except payment, they were then necessarily required to prove all the issues except the issue of payment.

The record in this case fails to show whether the jury took any instructions whatever to their jury-room, and, in the absence of such a showing, this court will presume that the proceedings of the court in that regard were regular; but if it affirmatively appeared that no instructions were taken to the jury-room by the jury, error upon that account could not be assigned, because the record does not show a request from plaintiffs to have the instructions sent to the

jury-room, or an objection by plaintiffs to their not being or having been so sent.

Sub-section 128 of section 2685, C. L. New Mexico, 1897, which provides that the instructions "shall be carried by the "jury to their room for their guidance to a correct verdict, "according to the law and the evidence," is a provision transported in the exact language from the State of Missouri.

Section 2188, Revised Statutes of Missouri, 1889, is as follows:

> "When the evidence is concluded, and before the "case is argued or submitted to the jury or to the "court sitting as a jury, either party may move the "court to give instructions on any point of law aris- "ing in the cause, which shall be in writing and "shall be given or refused. The court may on its "own motion give like instructions, and such in- "structions as shall be given by the court on its own "motion or the motion of counsel shall be carried by "the jury to their room for their guidance to a cor- "rect verdict according to the law and the evidence; "which instruction shall be returned by the jury "into court at the conclusion of the deliberations of "such jury and filed by the clerk and kept as a part "of the record in such case."

When the legislature of New Mexico adopted this provision from Missouri they adopted it together with the construction placed thereon by the courts of that state.

In the case of *Grove vs. City of Kansas*, 75 Mo., 672-677, the Supreme Court of Missouri, construing the provisions of section 2188, *supra*, held that where no objection is raised on account of the failure of the jury to take the instructions with them, there is no ground for a new trial.

D.

The burden of proving the contract as Jones asserted it to be was rightfully imposed on plaintiffs in error.

The objection, however, urged by the plaintiffs, that the court by its 13th instruction erroneously directed the jury as to the burden of proof, and imposed upon the plaintiffs the duty of proving facts and issues by a preponderance of the evidence which the law imposed upon the defendants, would, if the objection were sound, substantially affect the rights of the plaintiffs.

An examination and analysis of the pleadings and the issues raised by them and the evidence introduced to prove these issues will demonstrate the correctness of this instruction.

This instruction is objected to as an erroneous exposition of the law, on the ground that the burden was on the defendants to prove that a contract existed between the plaintiff Jones and the defendant Charles Springer, under the terms of which Jones was employed to attend to the entire litigation growing out of the suit of the Maxwell Land Grant Company *vs.* Dawson.

Ordinarily, the pleadings in a cause are controlling upon the question of burden of proof, as that term was used in the instruction complained of.

The complaint in this case alleges that the defendants employed the plaintiff Jones to render services for them, and agreed to pay the said Jones the reasonable value of his services, and that the reasonable value of such services is $75,000.

The answer of the defendants as to that allegation was a general denial. Under the ordinary rules, there can be no question upon whom the burden of proving his case rests, if the pleadings in the case are to control that question.

Under the general issue, or a general denial, the plaintiff has the burden of proving his claim; and in case the defendant denies merely, or answers so as not to admit, the plaintiff has the burden throughout the trial as to every part of the case.

Selma, etc., Ry. Co. vs. U. S., 139 U. S., 560.
Heineman vs. Hurd, 62 N. Y., 456.
Murphy vs. Harris, 77 Cal., 104.

The general rule is that the one who makes a claim which is denied has the burden of establishing the claim.

McEvoy vs. Swayze, 34 Neb., 315.

And in fixing the burden of proof a pleading or evidence that amounts to a denial has the effect of a denial although cast in the form of an assertion.

Union Nat'l Bank vs. Baldenwick, 45 Ill., 375.
Burnham vs. Noyes, 125 Mass., 85.
Berringer vs. Lake, S. I. Co., 41 Mich., 305.
Eastman vs. Gould, 63 N. H., 89.

Courts have, in determining the question upon what side the burden of proof rests, invented various tests—thus:

One common test to determine upon which party lies the burden is to ask which would be entitled to a verdict if no evidence were offered on either side.

Scott vs. Wood, 81 Cal., 398.
Welterall vs. Hollister, 73 Conn., 622.
Veiths vs. Hagge, 8 Iowa, 163.
McKenzie vs. Oregon Imp. Co., 31 Pac. Rep., 748.

Another test is to consider which party would fail if the allegation in question were stricken from the pleading.

Porter vs. Still, 63 Miss., 357.

Applying these various tests, it follows that a defendant who simply denies should never have the burden of proof.

Truner vs. Wells, 64 N. J. Law, 269.
Sears vs. Daly, 73 Pac., 5.
Benton vs. Burbank, 54 N. H., 583.

And if the evidence or pleading amounts to a denial, although either may take the form of an allegation, the rule is the same.

Cook vs. Malone, 128 Ala., 662.
East vs. Crow, 70 Ill., 91.
Denver Fire Brick Co. vs. Platt, 11 Colo., 509.
Coffin vs. President, etc., 136 N. Y., 655.
Perley vs. Perley, 144 Mass., 104.

The fact that defendants also by their answer plead payment in no wise changes the rule. Payment when plead to a cause of action is new matter, but its presence in the answer could not neutralize or destroy the issue raised by the general denial. The general denial, coupled with the plea of payment, is simply an assertion by defendant to the effect that *I deny that by reason of my employment of you I owe you seventy-five thousand dollars, and what I did owe you by reason of my employment of you I have paid.*

Mr. Pomeroy, at section 724, Code Remedies, says:

> "When a denial is pleaded in connection with a "defense of new matter, the admission in the one "can never be used to destroy the effect of the other. "The concessions of a defense by way of confession "and avoidance do not obviate the necessity of prov- "ing the averments contradicted by the denial. This "rule is universal."

There is much more reason for the rule when applied to pleadings such as were employed in this cause. Here the new matter, namely, the plea of "*payment*," was an allegation which could only refer to the defendant "Springer's"

version of the contract. It was in no sense a plea of confession and avoidance.

It is contended, however, that the question upon whom the burden of proof rests is not controlled in this case by the pleadings, but is controlled by the evidence which was adduced at the trial. That evidence discloses the following state of facts:

Mr. Jones testified as a witness in his own behalf, for the purpose of establishing the allegations of his complaint, to the following facts:

> "That on the tenth day of October, 1891, he was "engaged in the practice of law at Las Vegas, in the "Territory of New Mexico, and had been so engaged "since the fourteenth day of May, 1888, on which "day he was first admitted to the bar and on the last "day mentioned, the defendant, Charles Springer, "came to his office and told him that the Maxwell "Land Grant Company was going to bring, or had "brought a suit against John B. Dawson for his "ranch in Colfax county, and wanted him to repre-"sent Mr. Dawson in that litigation; that Jones ac-"quiesced, and thereupon Springer wanted to know "what fee would be charged and Jones said, 'I do "'not know what would be a right fee. I do not "'know anything about the case or how much work "'would be required, or the value of the property "'involved,' and said to Springer, 'You know more "'about that than I do. Whatever you think is "'right will be satisfactory to me.' Thereupon "Springer asked Jones if five hundred dollars would "be about right, and Jones replied, 'If you think "'that's fair, it will be satisfactory to me;' * * * "that Springer then said, 'Well, we will fix the fee at "'five hundred dollars for the case in the District "'Court and in the Supreme Court of the Territory,' "and Springer thereupon gave Jones a check for one "hundred dollars on account of his fee; that nothing "was said about the case in the Supreme Court of the "United States or about a second trial or about a sec-"ond appeal to the Supreme Court of the Territory;

"* * * that the legal questions involved in the "ejectment suit were difficult and novel and that he "expended a vast amount of labor in the preparation "and trial of the case; that after the first trial, the "defendant, Charles Springer, came to him and said: "'Of course, you cannot be expected to attend to this "'business for any five hundred dollars. You go "'ahead with it; we will see how we will come out, "'and when it is all over you will be paid what is "'right;' that Jones assented to this and went on "with the case with that understanding."

Record, pp. 28, 29.

This is all of the evidence of the plaintiffs which goes to the establishing of the terms under which the plaintiff Jones accepted his employment from the defendant Charles Springer.

Under the general denial, the defendant Charles Springer put in evidence on the part of the defendants all of the testimony bearing upon the employment of Jones by him, viz:

"After the suit was brought, witness visited Las "Vegas to employ counsel and determined to employ "A. A. Jones if he could do so; that he was not per- "sonally acquainted with Mr. Jones and was intro- "duced to him on the day when he first spoke to "him about the Dawson case and told Mr. Jones "something of the case; told him that the Maxwell "Land Grant Company had brought a suit in eject- "ment against Mr. Dawson involving the title to his "ranch in Colfax county; that he had to pay all the "expenses of the litigation; that he had come to see if "he could employ him; that Jones asked the witness "if he had employed or if he expected to employ any- "body else; the witness told him he had not and "had no intention of doing so; that he told Jones "that the case would undoubtedly be bitterly fought "by the Maxwell Land Grant Company and that "they had, up to that time, never been defeated in "a lawsuit; that the case would undoubtedly go to "the Supreme Court of the United States and asked

"him what he would charge the witness to conduct "the litigation and Jones answered, 'I am willing to "leave the matter entirely with you;' that witness "then said, 'I would like to have settled what your "charges will be' and asked Jones to state what his "charges would be, to which Jones replied that he "did not care to do that; that the witness said, 'How "would a fee of five hundred dollars do?' to which "Jones replied, 'That will be perfectly satisfactory;' "and the witness said, 'That is for the entire litiga-"tion?' Mr. Jones, after some hesitation, said, 'Yes. "I am satisfied with that;' that witness told Jones "that he had considerable other business, some of "his own and some that he controlled, which would "require the services of an attorney and that if he "undertook the Dawson case, witness would give "him such business as he had in that line and get "whatever business for him that witness could get "on the outside; witness said also that he would "himself assist in the case in every way possible and "would get up all maps and plats and surveys and "generally hunt up all the evidence in the case; that "Jones made no inquiry with reference to the au-"thority of witness to employ him in the case and "all that was said on that subject was that witness "had an interest in the property and had to pay the "expenses of the litigation. * * * That the "witness never said to Jones, at the time and "place said by Jones, or any other time, that he, "Jones, could not be expected to carry on the "case for a fee of five hundred dollars or to go "on with the case and we will see how we "come out and when it is all over you shall "be paid what is right; that there was not dur-"ing the trial or at any other time any agree-"ment or proposition to make any change in the "compensation or mode of compensation which "Jones was to receive for his services as attorney for "the defendant in that case; that there was never "any change made in the agreement as to compen-"sation of Mr. Jones in that case prior to the final "determination of it, and Mr. Jones never intimated "to witness that he was dissatisfied on account of

"his compensation; that witness paid to Jones seven "hundred dollars and to an attorney in Washington "one hundred dollars, and that two hundred of the "seven hundred, Jones claimed he should have for "expenses to Washington; * * * the other five "hundred dollars was paid as his fee in that case "under the contract."

Record, pp. 39–40, 41.

An analysis of this testimony discloses that the plaintiff Jones by the evidence affirmed that he was employed to attend to the litigation in the case of The Maxwell Land Grant Co. *vs.* John B. Dawson for the sum of $500, which was to be in payment for his services rendered in the trial of that case in the District Court of San Miguel County and in the Supreme Court of the Territory of New Mexico, and that his contract with the defendant Charles Springer did not embrace or extend to the services he performed in the trial of the case in the Supreme Court of the United States, nor at the second trial of the case in the District Court of San Miguel County or in the Supreme Court of the Territory of New Mexico.

The plaintiff Jones affirmed all of these facts. The defendants affirmed nothing whatever. They agreed with the plaintiff Jones that a contract existed between the plaintiff Jones and the defendant Springer; that the plaintiff Jones had been employed under the terms of an express contract to attend to certain litigation for the sum of $500. They denied, however, that the employment only covered the services to be performed by Jones in the District Court of San Miguel County and the Supreme Court of the Territory of New Mexico. They denied the testimony of Jones, which was to the effect that his employment did not include compensation for his services rendered in the Supreme Court of the United States, or at the second trial of that cause in the District Court of San Miguel County and in the Supreme Court of the Territory of New Mexico. Defendants at no

time affirmed anything; neither have they at any time asserted any fact as to which evidence had not already been introduced by the plaintiff. Their entire testimony consisted of a denial of the cause of action of the plaintiff Jones.

Further analyzing this testimony, let us see of what the cause of action of the plaintiff Jones consisted: Mr. Jones claims that he was employed by the defendant Springer to attend to the litigation in the case of The Maxwell Land Grant Company *vs.* Dawson in the Supreme Court of the United States and in the District Court of San Miguel County and in the Supreme Court of the Territory of New Mexico upon the second trial of that cause in those courts, and that that employment was not embraced in the contract which he and Mr. Springer had made by which his compensation was fixed at $500.

Plainly, if the plaintiff Jones had a cause of action against the defendants, it did not grow out of the express contract, because, according to his testimony and the testimony of Springer, the services rendered under that contract were paid for. His cause of action, then, grew out of subsequent alleged employment, the services rendered by him in the Supreme Court of the United States and in the District Court of San Miguel County and the Supreme Court of the Territory of New Mexico on the second trial of that case.

This defendants denied. They admitted no part of it. They sought to defeat the cause of action on the part of the plaintiff by controverting it and denying it *in toto.* They did not admit it and then seek to avoid it by showing affirmative facts which had accrued subsequent to the facts testified to by the plaintiffs. They have affirmed nothing, but have denied generally the testimony of the plaintiffs which gave the plaintiffs a cause of action against them.

The fact that the plaintiff Jones did not give any evidence in rebuttal of the testimony of the defendant Springer upon the issue between them relative to the employment of Jones is significant. If the burden shifted to Springer, it could

only have been by reason of the fact that he put in evidence new matter which was not testified to by plaintiff Jones. If new matter had been introduced in this case by the defendants, it would have been incumbent upon plaintiff Jones to refute this by testimony. The plaintiff Jones, however, was not called upon by the testimony to rebut what the defendant Springer had testified to; and had he taken the stand for the purpose of rebutting the testimony of defendant Springer, it could only have amounted to a reiteration by him of the same facts which he gave in evidence upon the trial in his examination-in-chief. This fact clearly demonstrates that the effect of the testimony of the defendant Springer was only a general denial of the evidence of the plaintiffs and was not new matter.

And so, too, the suggestion that the express contract was modified after it had been made is an assertion of Jones. This assertion originated with him and he initiated proof thereon. Springer simply *denied this assertion, admitted no part of it,* nor did he avoid it by new matter.

Should the plaintiffs, however, contend that the defendants relied upon a different contract from the one put in evidence by plaintiff Jones, they are still in the same dilemma. Under a general denial, the defendant may show that the contract between him and the plaintiff was a different one from that set out in the complaint.

In discussing this proposition in the case of *Wilkerson vs. Farnham,* 82 Mo., 672-679, the Supreme Court of Missouri said:

> "Under a general denial the defending party is "always at liberty to disprove and overthrow the con- "tract asserted against him by proving that it was "materially different from the one so asserted."
>
> *National Cash Register vs. Riggs,* 50 N. Y. Supp., 35.

In *Young vs. Jones,* 8 Iowa, 219, the Supreme Court of Iowa said:

"The defendant is allowed to show in any manner "that the contract alleged was not the agreement by "the parties and this cannot be done more effectively "than to prove an entirely different contract and "promise of the defendant."

Under a general denial, the defendant may always show what the contract really was.

Marsh vs. Dodge, 66 N. Y., 533.
McGill vs. Hall, 26 S. W., 132.

And so, in an action on an *implied* contract for services rendered, the defendant may show under a general denial that there was an express contract for the same services, *and even though such express contract be unlawful and invalid.*

Stewart vs. Thayer, 170 Mass., 560.

See also—

Paris vs. Strong, 51 Ind., 339.
Chicago, etc., Ry. vs. West, 37 Ind., 215.
Wheeler vs. Billings, 38 N. Y., 263.
Marsh vs. Dodge, 66 N. Y., 533.
Goddard vs. Fulton, 21 Cal., 430.
Wilkerson vs. Farnham, 82 Mo., 672.

The evidence given by the defendants as to the extent of the express contract did not tender a new issue, but simply met and controverted the issue affirmed by the plaintiffs.

The evidence of the plaintiffs in this case was to the effect that for part of his services he was to be paid $500, and for the remainder of his services he was to be paid what they were reasonably worth.

The defendants contend that the services were to be paid for as their value was fixed by the express contract. The plaintiff affirms that $500 and the additional sum of $75,000 was the value of his services and what the defendants owed him. The defendants denied this, and insisted

that the sum of $500 fixed the value of the entire services of the plaintiff Jones.

The gist of the action is: How much did the defendants promise to pay Jones for his services? The plaintiff Jones affirms that the defendant promised him $500, which had been paid, and the additional sum of $75,000, and that consequently the defendants owed him the sum of $75,000. The defendant Springer insists by his evidence that he only promised to pay the plaintiff Jones $500 for those services, and denies that he had promised the additional sum of $75,000.

If the plaintiff had sued the defendant upon a contract, and alleged that for certain services he had performed the defendant owed him one hundred horses, and the defendant's answer was a general denial, could he not, in order to disprove the issue of plaintiff, show that he was to have paid two horses for the services to be performed by plaintiff instead of one hundred? Would not this controvert the plaintiff's issue and in effect be only a denial of the issue he tendered? And, if this is so, would it not be incumbent upon the plaintiff to prove his issue by a preponderance of the evidence? The plaintiff affirms that one hundred horses were to be paid. He holds the affirmative of this issue. The defendant denies this, and to disprove this issue insists that only two horses, instead of one hundred horses, were to be paid to plaintiff. This is a fact inconsistent with the truth of plaintiff's issue. Can it be said that the burden is also upon the defendant to prove that only two horses instead of one hundred horses were to be paid to the plaintiff, and that he must prove this by a preponderance of the evidence? If so, *then the anomaly is presented that the plaintiff must prove the issue he has affirmed by a preponderance of evidence, and the defendant must disprove the same issue by a preponderance of the evidence.*

In this cause there was nothing before the court but the one contract of employment. Plaintiff Jones introduced this

contract before the jury, and his cause of action, if any he had, against Springer depended entirely on the correctness of the version of Jones. If Springer's version of the contract was correct, then he had no cause of action.

Froelich vs. Christie, 92 Northwestern Rep., was a cause wherein the facts are almost identical with the facts in the case at bar.

In the case at bar the main controversy was as to whether the contract included services rendered by Jones in the Supreme Court of the United States and rendered upon a second trial of the cause in the courts of New Mexico. Mr. Jones' version of the contract was that the contract did not include such services, while Mr. Springer's version was that they did include such services.

In the case above cited the "principal controversy" was as to whether the contract included the cutting of certain timber upon the east side of a certain creek. The plaintiff asserted that the contract only provided for the cutting on the west side of the creek. The defendant denied this, and asserted that the terms of the contract required the cutting on both the west and east side of the creek. The Supreme Court of Wisconsin, in reversing the case because the trial court had misdirected the jury in its instruction upon the burden of proof, and holding that the burden of proof was upon plaintiff, said:

> "It is claimed that there was an error in charging "the jury as to the burden of proof. The court was "requested to instruct the jury upon that subject. "The defendant claimed that the burden of proof "was on the plaintiff as to all material questions in "the case. The plaintiff claimed that the burden of "proof was on the defendant as to whether the con- "tract included the timber on the east side of the "creek, and as to whether the plaintiff had failed to "perform the contract. After hearing such claims "the court charged the jury as follows: 'The court "concluded to say that the burden of proof is not on "either party as to any of these questions; that you

"are to answer these questions according to the facts—
"according to the weight of the evidence. The bur-
"den is on neither party.' While the plaintiff's
"cause of action is based upon contract, yet his com-
"plaint fails to allege the terms of the contract.
"The answer contains a general denial. It also
"alleges, by way of a separate defense, that the
"services of the plaintiff were rendered under a
"special contract which the plaintiff had failed to
"perform, as indicated in the statement of facts.
"The plaintiff was a witness in his own behalf, and
"testified to the effect that the services for which he
"claimed judgment were under a contract with the
"defendant for cutting, skidding and hauling what
"logs there were on the west side of the creek; and
"that the contract did not include the logs on the
"east side of the creek; and that the R. Connor Com-
"pany had nothing to do with the contract; and that
"he did complete the contract as thus made. The
"defendant denied both propositions, and insisted
"that the contract included the timber on the east
"side of the creek, and that the completion of the
"job was to be such as would be acceptable to the R.
"Connor Company. On the trial the defendant con-
"ceded that, if the contract only included the timber
"on the west side of the creek, then it had been
"completed. The contract under which the plaintiff
"claims the right to recover, having thus been
"brought into the case, we are constrained to hold
"that the burden of proving the complete perform-
"ance of that contract was on the plaintiff. It fol-
"lows that the instructions thus given to the jury
"were erroneous."

In *Trust Co. vs. Seefke*, 144 N. Y., 354; 39 N. E., 358, the Court of Appeals of New York said:

"There is confusion sometimes in treating of the
"burden of proof arising out of inexact definitions.
"The burden is upon a plaintiff to establish his cause
"of action when it is in proper form denied by the
"other party. * * * It is very common to say
"in such cases that the burden is upon the defendant

"to establish the fact relied upon. All this can properly mean is that when the plaintiff has established "a *prima facie* case the defendant is bound to controvert it by evidence, otherwise he will be cast in "judgment. When such evidence is given, and the "case upon the whole evidence—that for and that "against the fact asserted by the plaintiff—is submitted to court or jury, then the question of the "burden of proof as to any fact in its proper sense, "arises, and rests upon the party upon whom it was "at the outset, and is not shifted by the course of the "trial; and the jury may be properly instructed that "all material issues tendered by the plaintiff must be "established by him by a preponderance of evidence. "See Davis *vs.* Jenney, 1 Met., 221; Simpson *vs.* "Davis, 119 Mass., 269. * * * The general rule "of pleading, which also accords with reason, is that "defenses which assume or admit the original cause "of action alleged, but are based upon subsequent "facts or transactions which go to qualify or defeat "it, must be pleaded and proved by the defendants; "and, on the other hand, the cause of action alleged "by the plaintiff and all its material incidents, must "be asserted and proved by him, and in both cases the "final event must be supported by a preponderance "of evidence in favor of the party tendering the "issue."

In *Scott vs. Wood*, 81 Cal., 398, 400, the court said:

"The case turned upon the question whether, dur"ing a portion of the period in which the plaintiff "rendered services his salary was $200 or $250 per "month. Upon this question the evidence was con"flicting. The defendant testified that the salary had "been fixed at $200 a month in the beginning of "1870, and the plaintiff testified that it had not. The "court instructed the jury in relation to the matter "as follows:

"'The jury are instructed that the defendants ad"mit employing the plaintiff on July 3, 1869, at the "rate of $250 per month, and that he worked for "them continuously until the first day of April, 1885;

"and that the burden of proof is upon the defendant
"to show that plaintiff's compensation was changed;
"that unless the defendants establish by a preponder-
"ance of testimony that plaintiff in 1870, or at some
"other time, agreed to work for defendants during
"the years 1870 and 1871, at the monthly compensa-
"tion of $200, then they must find for the plaintiff.'
"This was excepted to, and is specified as error.

"We think that the court erred in telling the jury
"that the defendant was required to have a pre-
"ponderance of testimony upon the question men-
"tioned."

And in *Homire vs. Rodgers*, 37 N. W., 972-974, the court said, the case being exactly in point on this question:

"The district court instructed that 'if defendant
"collected the money, claiming that the amount col-
"lected was simply the amount that was due him for
"the pasturage, the burden was on him to establish
"that he was entitled to all the money collected.'
"We think this instruction is erroneous. It puts
"upon defendant the burden of proving the truth of
"the representation upon which the money was paid
"to him. Whether that representation is true or
"false, depends upon whether the contract between
"the defendant and the intestate was as claimed by
"defendant or as claimed by plaintiff. Plaintiff
"alleged that under the agreement between defend-
"ant and the intestate the former was to receive forty
"cents per month for the pasturage; but defendant
"claims that he was to receive two dollars per head
"for the balance of the season, and he collected that
"amount from the owners of the cattle and repre-
"sented to them, when he made the collections, that
"that was amount due him. Now the burden was on
"plaintiff to prove his averment, and its establish-
"ment would necessarily prove the falsity of the de-
"fendant's claim; but, if the burden was on defend-
"ant to establish the truth of his claim, as the in-
"structions hold, it follows that plaintiff was relieved
"of the burden of proving his allegation The de-
"fendant pleaded affirmatively that, under the con-

"tract, he was to receive two dollars per head for "pasturing the cattle, but he was not required to do "that. The whole question as to what compensa- "tion he was to receive would have arisen under a "general denial of plaintiff's averments. The affirma- "tive allegation in the answer did no more than raise "that question; and the fact that the matter was "pleaded in that form does not change the rule as to "the burden of proof.

"For this error the judgment must be reversed."

In *Mott vs. Baxter* the Supreme Court of Colorado, 68 Pacific Rep., 220, considered the question of burden of proof in a cause wherein the facts were practically the same as in the case at bar. The court said:

"*Per Curiam:* This action was commenced before "a justice of the peace; consequently there are no "written pleadings. The party defeated before the "justice appealed to the county court, where the "plaintiff (appellee here) recovered the full amount "of her claim. From this judgment the defendant "appealed to the Court of Appeals, where it was "affirmed (Mott *vs.* Baxter, 13 Colo. App., 63; 56 "Pac., 192), and he now brings the case here for "review on appeal.

"One item of plaintiff's account is a balance for "services which she claims to have rendered defend- "ant in the capacity of stenographer from November "12, 1894, to December 21, 1895, at an agreed sum "per week. Her testimony on this subject is to the "effect that she entered into a contract with the de- "fendant by which she was to be paid a stipulated "price by the week or month for such time as she "was in his employ, and that she worked for him for "the period claimed under this agreement. Defend- "ant testified that about the 1st of June, 1895, the "original contract was terminated, and although she "remained at his office, and performed some services "for him, after that date, it was under an entirely "new and different arrangement from that originally "entered into. The court instructed the jury that

"the burden of proof was upon the defendant to es-
"tablish that the original contract of hire was re-
"scinded by mutual agreement. The question then
"presented is, Was the defense which the defendant
"interposed to the account of plaintiff, which accrued
"after the date he says the original contract of hire
"was terminated, affirmative, or was it simply a
"denial of indebtedness as to that part of her ac-
"count? If of the first character, then the instruc-
"tion was correct, for the burden rests upon the party
"who holds the affirmative of a proposition of fact
"(1 Greenl. Ev., 74; 5 Am. & Eng. Enc. Law, 2nd
"ed., 23); if of the latter character, then the instruc-
"tion was erroneous, for a simple denial tenders no
"affirmative issue. 'A statement of facts, by way of
"defense which are merely inconsistent with those
"stated by the plaintiff, is, in effect, a denial. It is
"not new matter. It admits nothing. It simply con-
"tradicts' (Bliss, Code Pl., 2nd ed., 333; Sylvis *v.*
"Sylvis, 11 Colo., 319; 17 Pac., 912). There being
"no written pleadings, the issues are defined by the
"evidence (Hincham *v.* Keener, 5 Colo. App., 300;
"38 Pac., 611); and it is from this source that the
"issue between the parties, so far as material to the
"instruction in question, must be determined. The
"statements of defendant directly contradict the
"claim of plaintiff that she had rendered services for
"him after about June 1, 1895, under the contract of
"hire. In other words, they contradicted her claim
"that the original contract which was the basis of her
"cause of action was in existence after that date.
"Her right to a recovery for the whole of the period
"she worked for defendant depended upon her prov-
"ing the continuance of her contract for that period.
"The testimony of defendant that the contract was
"not in existence after about June 1, 1895, did not
"relieve her from the burden of proving its con-
"tinuance after that date, for the reason that it was
"not an admission of indebtedness as to that part of
"her account. On the contrary, it negatived her
"statement in this respect. This being the effect of
"the testimony of defendant, the defense thereby
"interposed to her account of services after June 1,

"1895, must be treated as a denial of such indebted-
"ness, because that defense permits a defendant to
"prove any and all facts which tends to negative the
"averments, or some one or more of them, which a
"plaintiff is required to establish (Sylvis *v.* Sylvis,
"*supra;* Bliss, Code Pl., 2nd ed., 327; Pom., Rem.
"& Rem. Rights, 691; Steward *v.* Goodrich, 9 Mo.
"App., 125; 1 Enc. Pl. & Prac., 817). Therefore his
"defense to that part of her account was in no sense
"affirmative; consequently the burden did not rest
"upon him to establish a fact which merely sup-
"ported his denial of indebtedness to her account to
"which his testimony was directed. For this reason,
"it was clearly error to instruct the jury that the
"burden of proof was upon him to establish the re-
"scission to which he testified."

The Supreme Court of Massachusetts in the case of *Phipps vs. Mahon et al.,* 141 Mass., 471, passed upon the questions here discussed in a case precisely analogous to the case at bar. In the Massachusetts case, as in this, the plaintiff in his complaint declared on an implied contract. In that case, as in this, the defendants' answer was a general denial, *and in addition they admitted the employment of the plaintiff and alleged that it was at a price agreed, namely,* $100 (one hundred dollars), which had been paid.

The trial court in the Massachusetts case instructed the jury that "the burden of proof was upon the plaintiff to "prove his case, that the service was rendered and what it "was reasonably worth; but that if the defendants sought to "avoid paying for the services what it was reasonably worth "upon the ground that there was an agreed price, it must "be proved that the price was agreed; and upon that the "burden of proof would be upon the defendants." The defendants excepted to this instruction upon the burden of proof, contending that it was upon the plaintiff.

It will thus be seen that every question concerning the burden of proof in the case at bar was directly involved in

the cause before the Massachusetts court. Upon the decision of the question the Supreme Court of Massachusetts said:

> "The plaintiff relied upon the fact that he had "rendered certain valuable service for the defend- "ants at their request, and that such service was rea- "sonably worth the sum of $200, as establishing a "contract by the defendants to pay this sum. Such "is the legal interpretation of his declaration, which, "in form, was an allegation that the defendants owed "him a certain sum according to an account annexed. "The plaintiff did not claim that any fixed price had "been agreed upon, although, had this been the case, "such price might be recovered under a similar count "(Loew *vs.* Pimental, 115 Mass., 44). By denying "the allegations of the plaintiff's declaration, the de- "fendants put in issue, not merely the facts stated "but the existence of the contract which was the "legal inference therefrom, if no other facts appear. "While proof of these facts, with the aid of the legal "inference to be deduced therefrom, establishes a "*prima facie* case so far as proof of a contract is re- "quired, it does not change the burden of proof in "the case. The defendants relied upon an alleged "agreement between themselves and the plaintiff, by "which the latter was to do the work, the price of "which is sued for, under a special contract for a "sum certain, which the plaintiff had already re- "ceived. It was for the defendants to offer some evi- "dence to rebut the inference to be deduced from the "facts proved by the plaintiff. They did not seek to "avoid the contract alleged by the plaintiff, or the "effect of it, but to disprove its existence. While, "in form, their evidence was affirmative, the use they "sought to make of it was strictly negative, and was "for the purpose only of rebutting the plaintiff's "proposition as deduced from the evidence offered by "him. The burden was still upon the plaintiff to "prove the contract alleged by him, upon all the "evidence in the case. If we supposed this evidence "to be equally balanced he could not recover, as he "has failed to prove that which is essential. In an "action for labor and services rendered, where the

" plaintiff seeks to recover what they are reasonably
" worth, he cannot do so if the whole evidence leaves
" it in doubt whether they were not gratuitously ren-
" dered. The defendant, by asserting that they were
" so rendered and offering any legal evidence to that
" effect, meets the *prima facie* case of the plaintiff,
" and the issue is then to be determined upon the
" whole evidence.

" The instruction of the learned judge was there-
" fore, erroneous, in holding that, upon proof that the
" services were rendered and proof of what they were
" reasonably worth, the burden of proof was on the
" defendants to show that there was an agreed price
" therefor. The defendants did not, by their evi-
" dence, seek to set up an independent proposition or
" distinct case, but to meet that set up by the plain-
" tiff."

The above case completely disposes of the contention of plaintiff, that the court erroneously instructed as to the burden of proof.

III.

It is finally contended that the Supreme Court of New Mexico erred in affirming the judgment of the trial court.

This cause was tried to a jury and the issues were found in favor of the defendant. The judge who tried the cause and who heard all of the evidence, when appealed to for a new trial, refused to grant it and entered judgment upon the verdict. It is evident that the great inequality between the value of the services rendered and the amount paid suggested by plaintiff is much more apparent than real when it is considered that neither the court nor jury were impressed therewith.

And when we consider that Jones at the time of his em-

ployment was but twenty-eight years of age; that as many trials as were had were not necessarily contemplated by him when he accepted the employment for $500; that the value of the land in dispute was entirely problematical, because the extent of Dawson's claim was not fixed or determined and might have been by the jury fixed at 500 or 1,000 acres instead of 23,000 acres, and that part of the consideration, as testified to by Springer, was that he would give all his business to Jones, as well as such other business as he controlled, and that Jones received from that source more than $8,000 according to his own testimony, and $15,000 according to Springer's testimony, it does not appear that Jones was underpaid for the services rendered.

Very respectfully submitted,

CHARLES A. SPIESS,
Attorney for Defendants in Error.

ALDIS B. BROWNE,
ALEXANDER BRITTON,
Of Counsel.

Supreme Court of the United States.

No. 146.—October Term, 1906.

Joseph M. Cunningham, Trustee; Ida May Jones and Andrieus A. Jones, Plaintiffs in Error, vs. Charles Springer and John B. Dawson. } In error to the Supreme Court of the Territory of New Mexico.

[February 25, 1907.]

The plaintiffs brought an action in the District Court in the Territory of New Mexico, in which they sought to recover $75,000 as the reasonable value of the services of the plaintiff Jones, as an attorney at law, rendered to the defendants at their request. For answer the defendants pleaded a general denial and payment. The jury returned a verdict for the defendants. The plaintiffs alleged exceptions to certain rulings of the judge who presided at the trial, which were overruled by the Supreme Court of the Territory, and are here upon writ of error to that court. The exceptions are stated in the opinion.

Mr. Justice Moody delivered the opinion of the Court.

The plaintiff Jones was engaged as an attorney at law by the defendants, in an action of ejectment to recover certain lands from one of the defendants, in which the other defendant had an interest. Under his employment Jones rendered services in the preparation and trial of the case in the District and Supreme Courts of the Territory of New Mexico and in the Supreme Court of the United States. The plaintiffs brought this action to recover the reasonable value of Jones' services. The defendants, admitting the employment and the services, contended that they were rendered under a special contract, whereby Jones agreed to accept five hundred dollars in full payment for the entire litigation, and that payment was made in conformity with the agreement. The plaintiffs, admitting that a payment of five hundred dollars was made to and accepted by Jones, contended that it was made and accepted in pursuance of an agreement to accept that sum as full payment for the service to be rendered in the first trial of the case in the District and Supreme Courts of the Territory, and did not cover the services in this Court, or in the subsequent proceedings in the Courts of the Territory, for which they claimed the sum of seventy-five thousand dollars as a reasonable compensation. The parties introduced evidence in support of their respective contentions. The jury returned a

verdict for the defendants. Exceptions to the rulings and instructions of the Court are presented here for consideration.

Both parties offered testimony of witnesses, who qualified as experts, as to the value of Jones' services, and their estimates ranged from two thousand to one hundred and twenty-five thousand dollars. Three witnesses called by the defendants on this branch of the case, after testifying to their qualifications and their knowledge of the course of the litigation in which Jones was employed, gave their opinion of the value of Jones' services on the assumption that his fee was not fixed by contract. No objection was made to the testimony at the time it was given, but it appearing upon cross examination that each witness assumed in his own mind some value of the land in dispute in the litigation in which Jones was employed, counsel for the plaintiff, without asking what that value was, in the case of each witness at the conclusion of his testimony, moved to strike it out, because it was based upon an assumption of the value of the land in controversy in the original case, which was not disclosed to the jury and not based upon the evidence in the case on trial. To the refusal of the court to strike out the testimony the plaintiff excepted.

These three exceptions do not materially differ, and may, therefore, be considered together. They illustrate the importance of a strict application of the principle that the excepting party should make it manifest that an error prejudicial to him has occurred in the trial in order to justify an appellate court in disturbing the verdict. The witnesses were testifying in chief in response to hypothetical questions which do not appear in the record. The plaintiff had the right to the fullest cross examination for the purpose of determining their competency and affecting the weight of their testimony. If there was in the mind of either of the witnesses an assumption of fact not fairly presented by the evidence, or one which the jury might regard as improbable, it might have been elicited upon cross examination, and the testimony then excluded or discredited accordingly. This course was not pursued by counsel, who preferred to obtain the benefit of an exception. To say the least, it is difficult to detect any error in the rulings. But assuming, without deciding or intimating, that there was error in the refusal of the court to strike out the testimony of these witnesses, the error was not prejudicial to the plaintiffs, because, by the course of the trial, this branch of the case became entirely immaterial. The defendants' contention was that Jones was employed under a contract by which he agreed to give his services throughout the entire litigation for $500, and that he had been paid in accordance with the terms of the contract. The plaintiffs' contention was that he agreed upon $500 as his compensation for the trial of the case in the District Court and the Supreme Court of the Territory, and that for all subsequent services

he was entitled to be paid a reasonable compensation. In the charge to the jury these conflicting contentions were clearly submitted for determination. The jury were instructed that if, as the defendants asserted, Jones had agreed to give his services throughout the entire litigation for $500, and that that $500 had been paid to him, that the verdict should be for the defendants. The jury were instructed on the other hand that, if the contract between the parties was as asserted by the plaintiffs, the jury should find for the plaintiffs whatever part of the $500 remained unpaid and, in addition thereto, the reasonable value of the services Jones rendered in the subsequent proceedings. In other words, the jury were instructed that, only in the case Jones agreed to give his services throughout the entire litigation for $500, which had been paid, there should be a verdict for the defendants; otherwise there should be a verdict for the plaintiffs in a sum to be fixed by the jury. The jury did return a verdict for the defendants. The verdict, therefore, affirmed the defendants' version of the contract and thereby rendered all of the testimony as to the value of Jones' services immaterial. The plaintiffs, however, urged in argument before us that the evidence of the value of Jones' services was competent not only as fixing the amount which he might recover in case his version of the contract should be found by the jury to be true, but also in the settlement of the dispute as to the terms of the contract between the parties, upon the theory that if the services of Jones were reasonably worth a far larger sum than $500, that fact would have some tendency to show that he did not agree to render them for $500. However this may be, the testimony on the value of the services was not admitted for any such purpose. Each witness testified upon the assumption that the compensation was not fixed by contract, and it was upon that assumption alone that the testimony was submitted for the consideration of the jury. It was not admitted for the purpose of determining the dispute between the parties as to the terms of the contract. Moreover, in submitting that testimony to the jury under instructions which were clear and adequate, the judge who presided at the trial limited it to the purposes for which it was admitted, and instructed the jury that if they believed from the evidence that the contract was that Jones should give his services throughout the entire litigation for $500, then the jury "should not consider the evidence of the various attorneys who have testified to the reasonable value of the services of the said Jones, but should disregard the same, for the reason that the contract has limited and fixed the amount to which said Jones is entitled." To the admission of the evidence for this limited purpose, to the instructions of the Judge thus limiting it and directing that it should be disregarded if the jury found the defendants' version of the contract to be true, the plaintiffs did not object. It is

too late now to claim that it might have been admissible for a broader purpose. There is, therefore, presented a case of evidence admitted and used solely upon an issue which has become immaterial by the verdict of the jury. Any error, therefore, if such there were, in admitting the evidence became immaterial. *Greeenleaf* v. *Birth*, 5 Pet. 132; *Brobst* v. *Brock*, 10 Wall. 526; *Poland* v. *Brownell*, 13 Mass. 138; *Sullivan* v. *Railway*, 162 Mass. 526; *Hotel Co.* v. *Grove Co.*, 165 Mass. 260; *Geary* v. *Stevenson*, 169 Mass. 23; *Read* v. *Nichols et al.*, 118 N. Y. 224; *Schrubbe* v. *Connell*, 69 Wis. 476; *Nones* v. *Northouse*, 46 Vt. 587; *Carruthers & Murray* v. *McMurray*, 75 Iowa, 173; *Allen* v. *Blunt*, 2 Wood & M. 129; *Burnett* v. *Lutterell*, 52 Ill. App. 19. For these reasons the three foregoing exceptions should be overruled.

The thirteenth instruction to the jury was as follows:

"In this case the burden of proof is upon the plaintiffs as to every material fact, except that of payment, as to which fact the burden of proof is upon the defendants. In order to entitle the plaintiffs to recover in this case, they must establish every such material fact, with the exception aforesaid, by a preponderence of the evidence; and if you find that the evidence bearing upon the plaintiffs' case is evenly balanced, or that it preponderates in favor of the defendant, then the plaintiffs cannot recover, and you shall find for the defendants."

To this instruction the plaintiff excepted. Thereupon the judge said to the jury:

"In the thirteenth instruction given you by the court, in which I spoke about the burden of proof, I have concluded to modify that instruction by striking out the words *material fact* in the second line and inserting in lieu thereof the word *issue;* and also in same line the word *fact* and insert in lieu the word *issue*, and in the fifth line strike out the words *material fact* and put in the word *issue*—so the instruction will read, gentlemen, as follows:

'In this case the burden of proof is on the plaintiffs as to every issue, except that of payment, as to which issue the burden of proof is upon the defendants. In order to entitle the plaintiffs to recover in this case they must establish every such issue, with the exception aforesaid, by a preponderance of the evidence; and if you find that the evidence bearing upon the plaintiffs' case is evenly balanced, or that it preponderates in favor of the defendants, then the plaintiffs cannot recover, and you should find for the defendants.'

"Now, gentlemen, I will withdraw instruction No. thirteen given to you before and insert and give this amended instruction instead."

The court read the foregoing amended instruction from a carbon copy of the original charge, in which the words above mentioned as stricken out were crossed out with a peacil, and the words mentioned as having been inserted were written in with a pencil. After the foregoing amended instruction was read to the jury, the counsel for the plaintiffs, said to the court:

"As thus modified I think the charge is absolutely without objection, if the court please."

The exception, therefore, was abandoned in open court, but it is argued that reversible error appears in the record because it goes on to say:

"The amendment to the thirteenth instruction by the court to the jury as thus made was also taken down by the court's stenographer and transcribed by the said stenographer from his notes of the proceedings of the trial and attached to the original charge on file, after the verdict of the jury had been returned."

In support of this contention it was said that by section 2922 of the statute of New Mexico "all instructions to the jury must be in writing;" and that by section 3002 "the jury, when it retires, shall be allowed to take the pleadings in the case, instructions of the court and any instruments in writing admitted as evidence," and urged that either the record shows that the amended instruction in writing was not taken to the jury room, and therefore the plaintiff is entitled to claim this failure as an error, although it was not alleged at the time of the occurrence, or that by the failure of the court to send the amended instruction to the jury the plaintiff is entitled to the benefit of the original exception which was abandoned in open court. Whatever merit this contention may have rests upon the assumption that the amended instruction was not taken by the jury when it retired. We do not know whether it was so taken or not. It is enough to say that the record does not affirmatively disclose that the judge failed to give the written amendment to the jury when it retired. If the plaintiffs' counsel did not discover at the time that the instructions were not taken by the jury, in accordance with the terms of the statute, it is too much to expect this court to conjecture that they were not taken, in the absence of any such statement in the record. *Grove* v. *City of Kansas*, 75 Mo. 672.

An exception is alleged to the refusal of the court to give the following instruction:

"If the jury believes from the evidence that the plaintiff A. A. Jones agreed with the defendant Charles Springer to defend the case of the *Maxwell Land Grant Company* v. *John B. Dawson*, for a fee of $500, and that thereafter and before the rendition of all the services agreed to be rendered by said Jones in said cause, the said Springer said to the said Jones, 'You cannot be expected to attend to this business for any $500; go on with the case, and we will see how we come out, and after it is all over, you will be paid what is right,' or words to that effect, and such proposition was accepted and acted on by said Jones, then the plaintiffs in this case are entitled to recover for the services of said Jones in said case whatever the same may be reasonably worth, as shown by the evidence in this case."

But the instruction requested was substantially as given by the court in instructions five and eight, which are as follows:

"Plaintiffs claim, however, that the original contract in relation to the services of A. A. Jones was modified by a subsequent agreement made with the defendant Charles Springer to the effect that his compensation was not to be limited to the $500 originally fixed, but that he was to go on with the litigation, see how it came out, and then Charles Springer would do what was right, and after the property should be sold he would pay said Jones a big cash fee.

"(8) If the jury believes from the evidence that the original contract in relation to Mr. Jones' compensation was afterward modified so that such compensation was not to be the $500 agreed upon, then you should find for the plaintiffs in such sum as you believe from the evidence to be the reasonable value for the services of Jones less whatever sum may have been paid thereon."

The plaintiff excepted to the refusal of the court to instruct the jury as follows:

"The court instructs the jury that the credibility of the witnesses is a question exclusively for the jury; and the law is that where two witnesses testify directly opposite to each other, the jury are not bound to regard the weight of the evidence as evenly balanced. The jury have a right to determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor and fairness, their apparent intelligence or the lack of intelligence, and from all of the other surrounding circumstances appearing on the trial, which witness is the more worthy of credit and to give credit accordingly."

But so far as the plaintiff was entitled to this instruction it was given to the jury by instruction 14. A judge is not bound to charge the jury in the exact words proposed to him by counsel. The form of expression may be his own. If he instructs the jury correctly and in substance covers the relevant rules of law proposed to him by counsel, there is no error in refusing to adopt the exact words of the request. *Continental Improvement Company* v. *Stead*, 95 U. S. 161.

The judgment of the Supreme Court of New Mexico is, therefore,

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.